

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

1			
2			
3	GROENEVELD TRANSPORT	)	
4	EFFICIENCY INC.,	)	
5		)	Judge Nugent
6	Plaintiff,	)	Cleveland, Ohio
7		)	
8	vs.	)	Civil Action
9		)	Number 1:10CV702
10	LUBECORE INTERNATIONAL,	)	
11	INC.,	)	
12	Defendant.		

TRANSCRIPT OF PROCEEDINGS HAD BEFORE

THE HONORABLE DONALD C. NUGENT

JUDGE OF SAID COURT,

ON THURSDAY, OCTOBER 20, 2011

**VOLUME 6**

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

1                   THURSDAY SESSION, OCTOBER 20, 2011, AT 8:27 A.M.

2                   (Proceedings in the absence of the jury:)

3                   THE COURT: Well, how was your search last  
4 night.

08:27:52 5                   MS. MICHELSON: I'm sorry?

6                   THE COURT: I said how was your search last  
7 night?

8                   MS. MICHELSON: I think you'll be pleased,  
9 your Honor.

08:27:52 10                  THE COURT: Not me.

11                  MS. MICHELSON: Your Honor, we did -- we did  
12 look carefully at the testimony of Mr. Van der Hulst and we  
13 also looked at the Sixth Circuit authority on the issue, and  
14 there is -- there are a number of relevant cases here. Not  
08:27:52 15 just Antioch and its progeny which is essentially a core  
16 functional component out of which everything else, including  
17 the exterior shape design and appearance flowed.

18                  In the case -- in our case, we are talking about  
19 obviously the overall appearance and presentation of the  
08:27:52 20 product, but also the unique and distinctive shape, whether  
21 the shape is Dick fated by that core component, and the  
22 evidence is that it is not. And Mr. Van der Hulst's  
23 testimony, I have specifics, but then taken into the context  
24 of the whole of his testimony, I will -- I will read it to  
08:27:52 25 you.

1           And there's a little bit to put the fullness of it in  
2 context, just about less than a page.

3           "Question: Were the commercial people and the sales  
4 people at Groeneveld involved in the design of the EP-0  
5 Groeneveld pump?

6           "Answer: Of course. We make -- we make art  
7 impression at that time. We make some sketches. How it  
8 would look like. I think we made even another model to show  
9 the pump to the people to management because there was money  
10 involved and we need to show what we are going to do. So  
11 they had an idea of the shape and the function is only yeah,  
12 telling how it will function, that's not too easy but the  
13 shape we have to show it. Yeah.

14           "Question: Does the shape or outline of the pump  
15 affect the way the thing performs, the 28 delivers grease  
16 throughout the system?

17           "Answer: No.

18           "Question: Explain there to the jury. It might be  
19 obvious, but I'm sorry, I will ask you to explain.

20           "Answer: It's like a car. No, the car go from A to B  
21 and they're all different. The shape has nothing to do with  
22 the function of the moving from A to B. And it's the same  
23 as the lubrication system. The only thing we have to do is  
24 create energy and that there's an outlet where grease is  
25 coming out. How you do that, you can do it in many, many

1 many ways."

2 Additional testimony that he gave along with this  
3 specifics, a reasonable jury can infer from this testimony  
4 and the totality of Mr. Van der Hulst's testimony and  
08:27:52 5 understanding of course that he is speaking in English and  
6 trying to convey his eye December in a language that isn't  
7 his first tongue, that there was separate, independent  
8 thought given by Groeneveld when it created its ultimate  
9 product to how the thing would look, and how to present it  
08:27:52 10 to the market. And that it was not dictated by what's going  
11 on inside the functional part, and that the shape and the  
12 silhouette and the outline of that pump is independent of  
13 what's going on inside and the functioning parts that make  
14 it work.

08:27:52 15 THE COURT: Okay.

16 So I guess what you're saying is that would be -- the  
17 outside appearance -- I'm trying to put a -- wouldn't that  
18 include the color and the logo? If that's what you're  
19 saying is the trade dress, is the appearance of it, doesn't  
08:27:52 20 that include the logo and the color as well?

21 MS. MICHELSON: The shape and the silhouette  
22 do not include the logo and the red --

23 THE COURT: You're saying the look of it.  
24 Trade dress has to include the logo and the color, doesn't  
08:28:17 25 it? But, if it was all -- it was a blue bottom?

1 MS. MICHELSON: If -- okay. I'm going to try  
2 to address what you're asking me. In terms of functionality  
3 and nonfunctionality, the --

4 THE COURT: No, no, no, no. I asked you.

08:28:17 5 MS. MICHELSON: Okay.

6 THE COURT: Specific question. You're now  
7 telling me that your claim in this case that the trade dress  
8 is the appearance of the outside appearance or the shape of  
9 the pump, am I right?

08:28:17 10 MS. MICHELSON: The shape -- the shape then,  
11 the silhouette.

12 THE COURT: What it looks like.

13 MS. MICHELSON: That I --

14 THE COURT: What it looks like.

08:28:22 15 MS. MICHELSON: Yeah.

16 THE COURT: When somebody looks at it.

17 MS. MICHELSON: Yes.

18 THE COURT: That's what you're saying, you  
19 have a distinctive shape, am I right.

08:28:22 20 MS. MICHELSON: Yes, I think that is the  
21 testimony.

22 THE COURT: Okay. So when you look at it,  
23 that would include the logo and the color, is that true?

24 MS. MICHELSON: It -- well, it does but not  
08:28:22 25 for purposes of the nonfunctionality analysis.

1 THE COURT: How do you separate it? Because  
2 that's how it appearance.

3 MS. MICHELSON: Because the -- the logo and  
4 the color has no impact on the shape or the silhouette of  
08:28:26 5 the pump.

6 THE COURT: You just read to me something that  
7 they take it to the marketing people, that would include the  
8 color and the logo, what it looks like, how you present it  
9 to the public.

08:28:26 10 MS. MICHELSON: Yes.

11 THE COURT: So it would include those two  
12 things.

13 MS. MICHELSON: That's part of it, but --

14 THE COURT: Include means part, doesn't it.

08:28:28 15 MS. MICHELSON: It's part of it but not for  
16 nonfunctionality analysis. Yes, there were thoughts that --  
17 there are -- there are I know I'm not answering your  
18 question and am trying to.

19 The logo is not part of the shape. It is not part of  
08:28:28 20 the -- and it has nothing to do with the functionality or  
21 nonfunctionality of the item.

22 THE COURT: You're trying to claim trade dress  
23 and I guess -- I guess you can't exclude the logo and the  
24 color if you're trying to do the appearance of the pump as  
08:28:32 25 your trade dress.

1 MS. MICHELSON: We are -- I do not believe  
2 that we've made a claim that the logo and the green is part  
3 of the trade dress.

4 THE COURT: Your.

08:28:32 5 MS. MICHELSON: That the shape --

6 THE COURT: Your confusion claim is if  
7 somebody looks at it they wouldn't know what it is.

8 MS. MICHELSON: They're different pieces of  
9 evidence are relevant -- our position is different pieces of  
08:28:35 10 evidence are relevant to different elements of the number of  
11 claims that we have asserted here.

12 THE COURT: Okay. Let me hear from you, Tom.

13 BY MR. ANASTOS:

14 Q. What I heard the plaintiff say they called out of  
08:28:35 15 Mr. Van der Hulst's testimony was that the shape does not  
16 affect the way it delivers the grease, and you can deliver  
17 the grease many, many ways. This goes back to the same  
18 thing they were saying yesterday. There are different ways  
19 you can do this. Had that is not the test of functionality.  
08:28:38 20 There was no evidence that they came back with that  
21 addressed the inward test of functionality in terms of  
22 different costs or ornamentation or the way it looks or the  
23 fact it's somehow not influenced by engineering in terms of  
24 how it came into existence. Magistrate Baughman found the  
08:28:38 25 evidence in this case shows all the elements of Groeneveld

1 pump are there for some practical benefit or reason. In  
2 other words, Groeneveld has not presented its pump in any  
3 way the equivalent of an automotive tailspin, a purely  
4 ornamental figure that contributes no demonstrable benefit  
08:28:42 5 to the operation or efficiency of the designed product.

6 That is as true today as it was at the preliminary  
7 injunction hearing. There is nothing about that pump that  
8 is ornamental, nothing that is fanciful, nothing that is  
9 arbitrary at all about the look of it. It is 100 percent as  
08:28:45 10 I argued yesterday, 100 percent the result of engineering  
11 issues from the way the base looks, to the way the reservoir  
12 looks, to the size of the reservoir to the cap on the  
13 reservoir to the follower plate in the reservoir.  
14 Everything about the look of that pump is the result of  
08:28:45 15 engineering influence. And then they put the label on it,  
16 and the only reason they put the label on it is because  
17 that's the only way anyone can tell it's a Groeneveld pump?

18 THE COURT: You can respond to that. I --

19 MS. MICHELSON: I --

08:28:54 20 THE COURT: There is -- I'm asking you, and  
21 this is what I asked for yesterday. Is there any evidence  
22 at all of -- that the design is nonfunctional? And you  
23 still haven't offered me any evidence.

24 MS. MICHELSON: The evidence is that the shape  
08:29:10 25 of it doesn't make it work and pump grease and Mr. Eissis



1 himself.

2 THE COURT: Where is that? See I think you're  
3 missing the point of the definition of function is what the  
4 requirement of trade dress is. You -- this is -- at least  
08:29:27 5 what I didn't hear much what the design of the pump is the  
6 design of the pump. All right, that's basically what we  
7 heard from the plaintiff in your case in chief.

8 And you decided to design it this way and it works  
9 this way. Okay.

08:29:43 10 MS. MICHELSON: The inside, and then he  
11 layered on -- then they -- the commercial people came in and  
12 they layered on the way it would be presented on the  
13 outside, and -- and there's -- the placement of specific  
14 parts that create this shape and this silhouette is --  
08:30:08 15 there's in reason for them to be in those specific places.

16 THE COURT: Where do you say that? Where is  
17 the evidence of that?

18 MS. MICHELSON: Your Honor, I mean Mr. Van der  
19 Hulst did testify that he -- that he would not make it this  
08:30:47 20 same way today because it is more expensive to make it look  
21 this way today, to have this particular shape and design  
22 today. Why is Groeneveld still making the pump, its own  
23 pump exactly this way if it's harder and more expensive to  
24 do so? Because it's our pump, we went on the market with  
08:31:07 25 this pump. Everyone knows this pump."

1 THE COURT: That's not answering the question.

2 MS. MICHELSON: I'm looking, I'm looking for  
3 some --

4 THE COURT: I listened to the Defense's  
08:31:19 5 testimony. Mr. Vermeulen. He said it's 100 percent  
6 functional. Every aspect the pump how it was designed, how  
7 he designed it is 100 percent functional and I guess I'm  
8 asking is there anything that the plaintiff put on that said  
9 that it's not. Is there any part of the design that's  
08:31:35 10 nonfunctional?

11 MS. MICHELSON: I think when Mr. -- when  
12 Mr. Van der Hulst describes how the shape and the silhouette  
13 and the outline and the way it was put together was not --  
14 was how do I say this right?

08:31:57 15 THE COURT: You see, there's not.

16 MS. MICHELSON: That it didn't --

17 THE COURT: Just because you can make it a  
18 different way doesn't make it nonfunctional. The question  
19 is how is this made and the reason this was made. Now,  
08:32:09 20 maybe they went and got a design from sales people and said  
21 could you do it this way and said yeah we could, that's  
22 okay, but still doesn't mean it's nonfunctional. You got to  
23 have somebody testify.

24 MS. MICHELSON: It's non -- I'm sorry.

08:32:21 25 THE COURT: You have to have somebody testify

1 that there's something on that. That it's done just for the  
2 sake of art, not for the sake of utility.

3 MS. MICHELSON: I think he did, your Honor,  
4 respectfully did talk about we -- about there's art  
08:32:34 5 impressions on the sketches that they made for the outside  
6 of it that would -- that in order -- you know, how they  
7 would present the guts of it, that actually of the things  
8 that make the pump operate in the system. And he did  
9 testify to that artistic impression and that that -- that --

08:33:06 10 THE COURT: Anyway.

11 MS. MICHELSON: I -- somebody just handed me  
12 something. Thanks for helping me out here.

13 "Question: Why did you want to make your pump look  
14 different than anybody else's? It's a challenge of the  
08:33:16 15 designer, and each let's say you want to make something  
16 different than anybody else. Yeah, you want to do that. So  
17 we want to give it a groove look so this has to be our pump  
18 for many, many years and it has to be good and nice."

19 I think from the totality -- this testimony and.

08:33:33 20 THE COURT: See, that doesn't answer the  
21 question about functionality. That talks about appearance.

22 MS. MICHELSON: It talks -- esthetics correct.  
23 It's separate from functionality and that the esthetics was  
24 a separate and distinct consideration that would -- that  
08:33:50 25 Groeneveld undertook --

1 THE COURT: But you're missing the whole point  
2 of what functionality is, what part of that -- where is  
3 there evidence to show they put a gas -- a grease port in  
4 one location versus another for esthetics and it has nothing  
08:34:07 5 to do with functionality? Or that they used the clear  
6 plastic for esthetics and not for functionality?

7 MS. MICHELSON: The -- there's testimony in  
8 the record that the shape of it is for the aesthetics and  
9 the presentation and the and the look and how --

08:34:25 10 THE COURT: Who testified in your case they  
11 got the clear plastic it was just invented and they came in  
12 long sheets and cut it up because they wanted to be able to  
13 see through?

14 MS. MICHELSON: Your Honor, we are not -- we  
08:34:34 15 are not claiming that specific -- that the individual  
16 components, in and of themselves do not perform some sort of  
17 function. We're --

18 THE COURT: Then your case is over if you're  
19 not claiming that.

08:34:47 20 MS. MICHELSON: I don't -- I respectfully  
21 disagree, your Honor, because the fact that component parts  
22 have a function does not -- is not dispositive on the issue  
23 of nonfunctionality. If -- in a products configuration  
24 case, if they are put together in a way that is not  
08:35:07 25 essential to the use and purpose of the article, and there

1 are shape cases and configuration cases and over all  
2 appearance cases, and each of these cases is really when you  
3 read the authority, they --

4 THE COURT: Tell me what evidence and where is  
08:35:25 5 the evidence is in this case that shows -- tell me what part  
6 of your pump is nonfunctional?

7 MS. MICHELSON: The shape of it and the  
8 silhouette and outline of it.

9 THE COURT: That's nonfunctional?

08:35:36 10 MS. MICHELSON: Yes.

11 THE COURT: Where's the evidence of that?  
12 Every part of it works, doesn't it? Could you take the  
13 bottom off and could it still pump -- I don't -- that  
14 doesn't make any sense to me at all.

08:35:52 15 MS. MICHELSON: Well, it needs a housing, yes.

16 THE COURT: Right.

17 MS. MICHELSON: But the housing doesn't have  
18 to be shaped particularly in this way in alignment.

19 THE COURT: But the housing was shaped like  
08:36:01 20 that and it serves a function to hold the grease, right?

21 MS. MICHELSON: And it doesn't have to be put  
22 together with the reservoir and the cap and the beveling and  
23 all these distinctive things.

24 THE COURT: See that's where you're missing  
08:36:15 25 the point because on trade dress, to have a unique trade

1 dress usually is logo or color or something like that. But,  
2 if you go to the shape, okay, that's -- if you're claiming  
3 that they used your same color or something like that,  
4 that's a different an argument, but you're not arguing that.  
08:36:31 5 You're arguing the shape, and all I'm asking you is where is  
6 there any evidence that the way it's shaped is knot  
7 nonfunctional? Because the way we have it now that you have  
8 a holder for the grease on the top and it's clear, it was  
9 done to hold the grease and so they could see the grease.  
08:36:52 10 That's functional. It that's not appearance.

11 MS. MICHELSON: And the question to the  
12 witness was.

13 "Question: Does the shape or outline of the pump  
14 affect the way the thing performs, the way it delivers  
08:37:01 15 grease throughout the system -H and he answered no and  
16 explained the shape has nothing to do with the function of  
17 the moving from A to B, that witness testified to that.

18 THE COURT: Who is that van der Hulst?

19 MS. MICHELSON: Yes.

08:37:17 20 THE COURT: All right. What do you think  
21 about that, Tom? I mean that maybe enough to get it to the  
22 jury on that issue, but I -- it is breath taking.

23 MR. ANASTOS: Just a couple of points, your  
24 Honor. They're making it sound like there is an outside to  
08:37:37 25 this, that was made to look nice, and we talked about this

1 with Mr. Van der Hulst. This is not an automobile that has  
2 a shell to it that you can design in different fashions to  
3 cover up all of the interior components. This is one of the  
4 interior components. So there's nothing malleable about the  
08:38:03 5 outside that can be done to make it artistic. It's not the  
6 Mona Lisa. It's a grease pump. Secondly, there's a  
7 thousand different reasons why Groeneveld could still be  
8 selling this pump as this pump after 30 years, not the least  
9 of which is it's a good pump. It functions well, and it  
08:38:23 10 functions well because of the design. And the design is  
11 entirely functional. Every component is there for  
12 functionality and the overall design is functionality.

13 They testified in -- that Ms. Michelson just argued  
14 that Mr. Van der Hulst testified that they wanted to make  
08:38:42 15 something different. Different does not equal  
16 nonfunctional. We've been over that a thousand times.

17 THE COURT: I know. That's why this is like  
18 arguing a negative and you can't do it.

19 MR. ANASTOS: And I mean I could -- the law is  
08:38:58 20 that we're engineering necessity influences the  
21 configuration of the functional components, the resulting  
22 design is functional. And that's from Abercrombie by one of  
23 the Sixth Circuit cases, where the -- where the -- a  
24 combination of functional elements has been configured in  
08:39:16 25 such a matter to be protected.

Eissis - Cross

1 THE DEFENDANT: Courts hold such functional  
2 figures must be configured in a quote, arbitrary, fanciful,  
3 or distinctive way in order to be entitled to protection.  
4 That's a quote from Antioch. There's No evidence whatsoever  
08:39:30 5 that anything about that shape is arbitrary or fanciful or  
6 distinctive. It's a grease pump that was put together  
7 because of the way they wanted it to look. That's 100  
8 percent of the evidence in this case.

9 THE COURT: Okay.

08:39:45 10 Let's continue with the testimony. I'll keep this  
11 under advisement.

12 (Proceedings resumed in the presence of the jury:)

13 THE COURT: Good morning, ladies and  
14 gentlemen.

08:41:39 15 THE JURY: Good morning.

16 THE COURT: Mr. Eissis, you can continue.

17 CROSS-EXAMINATION OF JAN EISSIS

18 BY MS. MICHELSON:

19 Q. Hello, Mr. Eissis.

08:42:47 20 A. Good morning.

21 Q. I'm going to show you what has been marked as Defense  
22 Exhibit in the case, Defendant's Exhibit I. Ma'am, excuse  
23 me.

24 And can you confirm for us please these are pictures  
08:43:17 25 of the Lubecore pump that were taken at the Toronto trade



Eissis - Cross

1 show that you testified about in your direct examination  
2 that it was in April of 2008. Can you confirm that that is  
3 a -- that those are pictures of the Lubecore pump, your  
4 pump, that was at the Toronto trade show in April, 2008?  
08:43:52 5 It's --

6 **A.** Can you show them one more time?

7 MS. MICHELSON: Sure. Can I just walk them up  
8 to him, your Honor?

9 THE COURT: Sure.

08:44:05 10 MR. KUNSELMAN: Thank you.

11 THE WITNESS: Yeah, I believe this is at the  
12 Toronto trade show. I think I remember gluing the stickers  
13 on the side of the trailer there.

14 **Q.** Okay. And, in fact, I now have on the overhead we  
08:44:20 15 marked those same pictures as Plaintiff's Exhibit 56. Can  
16 you confirm that, please, these are the same photographs,  
17 correct?

18 **A.** Yeah, probably, yeah.

19 **Q.** Do you need to take a closer look?

08:44:33 20 **A.** Yeah, it's correct, yeah.

21 **Q.** Okay. Thank you. And this is where you debuted your  
22 pump in Canada at the Toronto trade show?

23 **A.** Yes.

24 **Q.** And I see a black cap on the filler. Is that the  
08:44:52 25 filler coupling this --

Eissis - Cross

1       **A.**     That's correct.

2       **Q.**     And that's a black cap there?

3       **A.**     Yeah, that's correct.

08:45:05

4       **Q.**     Okay. And I see that they are -- you are in -- this  
5 picture depicts the use of the color green, the grease is  
6 green in this picture that you --

7       **A.**     This pump is green grease, yes.

08:45:25

8       **Q.**     Mr. Eissis, we were talking, I think, about the  
9 Lubecore warranty program and when we broke yesterday. Do  
10 you recall?

11       **A.**     Excuse me?

08:45:37

12       **Q.**     We were -- I'm directing your attention to where we  
13 left off yesterday. I believe we were talking about the  
14 Lubecore warranty program and I have a few questions about  
15 that.

16       **A.**     Okay. Oh, and --

08:46:09

17       **Q.**     Before we get there, I have a question about this  
18 Defense Exhibit you talked about. Defense Exhibit L, it's  
19 hard to see because of the light, but it says here  
20 component, Groeneveld fact, Lubecore fact, and then benefits  
21 for Lubecore customers.

22       **A.**     Yeah.

08:46:29

23       **Q.**     It's hard to see because of the shading, but you agree  
24 that this was a fact benefit analysis or a product  
25 comparison sheet that Lubecore put together to distribute to

Eissis - Cross

1 customers and users of the product?

2 **A.** Yes, all to distributors, yeah.

3 **Q.** Yeah.

4 And directing your attention to -- here we go. The  
08:47:03 5 first page of it, this says grease piston seal?

6 **A.** Yes.

7 **Q.** Okay. And under the Groeneveld fact, you put overing,  
8 O-ring with backup ring?

9 **A.** Yes.

08:47:17 10 **Q.** Under the Lubecore fact, you identified as a benefit  
11 that you instead use a quad ring?

12 **A.** Yeah.

13 **Q.** Okay. And in the column here, you tout the supposed  
14 benefits of using a quad ring?

08:47:33 15 **A.** Yeah.

16 **Q.** Instead of the O-ring?

17 **A.** That's correct.

18 **Q.** Okay. And I believe -- and your testimony was that  
19 the quad ring, in fact, had to be replaced with an O-ring

08:47:45 20 because it was defective and did not perform as well as the  
21 O-ring, right?

22 **A.** Yes, this analysis was made before we knew of the  
23 issue with the quad ring, and after that, also had to be to  
24 an O-ring to make it work.

08:48:02 25 **Q.** In fact, sir, you brought with you to court and

Eissis - Cross

1 provided to you before your counsel did, right before your  
2 testimony some additional product comparison sheets that  
3 were marked as, I think that says Defense Exhibit DD,  
4 Defense Exhibit DD?

08:48:27

5 **A.** Okay.

6 **Q.** And you testified about these product comparison  
7 product comparison sheets during your direct testimony?

8 **A.** Yeah.

08:48:47

9 **Q.** And turning to the product comparison sheets relating  
10 to the Groeneveld product -- I want to just identify it for  
11 the record. It is the third substantive page of the  
12 exhibit, your company continues to represent to customers  
13 that the quad ring that Lubecore uses has a benefit to the  
14 O-ring that Groeneveld uses. Do you see that here?

08:49:22

15 Groeneveld fact, O-ring with backup ring, Lubecore fact,  
16 quad ring, and the benefits you still list there are  
17 benefits to a customer using the lube product instead of the  
18 Groeneveld because of the incorporation of this quad ring  
19 that you testified was a big problem and a big mess. Just  
20 says that there, right?

08:49:46

21 **A.** If this document is produced and used after we change  
22 from quad ring to O-ring, that's a mistake in our behalf.

23 **Q.** And this is a document, this exhibit that you all  
24 brought to court today, I mean --

08:50:20

25 **A.** This document was obviously made before we changed

Eissis - Cross

1 from O-ring to quad ring. I'll bring it out again. If we  
2 used this document, that's a mistake on our behalf. We  
3 shouldn't be using that anymore because the new pumps no  
4 longer have quad rings.

08:50:38 5 Q. The pumps are hermetically sealed, correct?

6 A. Excuse me.

7 Q. The pumps are hermetically sealed, correct?

8 A. What do you mean by the term "hermetically sealed"?

9 Q. They are sealed to the outside world. The inside is  
08:50:54 10 sealed off from the outside elements, right?

11 A. I would say so. It's not hermetically sealed. It is  
12 fenced.

13 Q. There are valves that prevent air from the outside  
14 from getting in?

08:51:11 15 A. No, this fence, venting holes in the pumps.

16 Q. Is it your testimony that the Lubecore pump is not  
17 hermetically sealed, and that air from the outside world  
18 gets into the pump, into the reservoir of the pump?

19 A. Above the follower plate, yes, air from the outside  
08:51:34 20 has to get in. Otherwise, the follower plate can't go down.

21 Q. Above the follower plate?

22 A. Yeah.

23 Q. Not below the follower plate?

24 A. Below the follower plate is grease.

08:51:43 25 Q. And not inside the housing of the pump, right?

Eissis - Cross

1       **A.**     Excuse me?

2       **Q.**     Not inside the housing?

3       **A.**     Inside the housing of the pump, the air is supplied  
4       through the air supply of the truck, and that air is cleaned  
08:51:59 5       through the air dry of the truck through a Descon filter so  
6       the air that goes into the pump on the bottom is filtered by  
7       the air system on the torque before it goes into the pump.

8       **Q.**     That occurs below the grease piston?

9       **A.**     Below the grease piston, the air goes in through the  
08:52:36 10      filtering system on the truck, correct, through the  
11      solenoid.

12      **Q.**     Above the grease piston it is sealed, correct?

13      **A.**     Above the grease piston, there's a special valve we  
14      put in what we call an O-pressure valve that goes into the  
08:52:54 15      side of the pump.

16      **Q.**     Yeah, I don't think so. I -- I'm sorry. I don't  
17      think I got an answer to the question. So -- I'm sorry.  
18      Can you read my question back to me, ma'am?

19             (Thereupon, the record was read back by the Court  
08:53:20 20      Reporter.)

21      **Q.**     That's my question.

22      **A.**     Above the grease piston, yeah, above the grease piston  
23      it is -- we are creating an over pressure. It is not -- I  
24      would have to explain that to you, the way it works is.

08:53:31 25      **Q.**     Can you just answer the question? It's sealed, right?

Eissis - Cross

1 MR. ANASTOS: Objection.

2 THE WITNESS: It is sealed.

3 THE COURT: Overruled.

4 THE WITNESS: Sealed to the degree there is a

08:53:39 5 5 PSI overpressure left.

6 Q. Okay. And the --

7 A. Air cannot go from -- air from the atmospheric  
8 condition, cannot go into that pump from any other way, into  
9 my pump below the piston or above the air piston. It cannot

08:53:54 10 go in there without going through the air system of the  
11 truck.

12 Q. And the PSI that's delivered to the pump is like a  
13 thousand PSI, correct?

14 A. No, incorrect.

08:54:04 15 Q. What is it?

16 A. Excuse me?

17 Q. What is it?

18 A. The air pressure being delivered to the pump is 120  
19 PSI.

08:54:13 20 Q. Okay. That's a lot greater than 5 PSI, right?

21 A. Yes, that's correct.

22 Q. Okay.

23 I'm showing you now what we've marked as Defense

24 Exhibit 86. There are a number of pictures, and we would

08:54:43 25 like you to -- the Defense Exhibit -- I'm sorry. Did I say

Eissis - Cross

1 Defense Exhibit? It's Plaintiff's Exhibit 86. And I'd like  
2 you to please confirm that this is Lubecore's warranty,  
3 Lubecore Warranty Process. This is your warranty plan?

4 **A.** This is a warranty plan, yes, a very old one.

08:55:07 5 **Q.** This is the only one that you're -- that Lubecore  
6 produced to us in this case in response to our written  
7 discover requests for all information regarding the product  
8 and warranty information, right? This is the one you  
9 produced to us, correct?

08:55:23 10 **A.** That is possible.

11 **Q.** If I represent to you that there's nothing in your  
12 document production regarding Lubecore warranty manuals and  
13 booklets and information, other than this document and this  
14 document that we've marked Plaintiff's Exhibit 85, you will  
08:56:08 15 not dispute that, would you?

16 MR. ANASTOS: Objection.

17 THE COURT: Sustained.

18 **Q.** Are you aware of any additional warranty information  
19 regarding your product that your company produced in this  
08:56:21 20 litigation?

21 **A.** Actually, it's a long time ago. I cannot answer that  
22 question truthfully, so.

23 **Q.** Your warranty -- your warranty basically provides that  
24 if customers used Lubecore 's grease in the Lubecore ALS,  
08:56:48 25 you will warrant the products and the parts for a specified



Eissis - Cross

1 period of time, right?

2 **A.** That's correct.

3 **Q.** I believe -- is it three years?

4 **A.** We've made some changes, but I believe that it's a one  
08:57:04 5 or two-year warranty on the pump normally on the system, and  
6 if you use our grease, it goes up to six years. So it's an  
7 additional four or five years. I think one year plus five,  
8 one plus five or two plus four, something like that.

9 **Q.** Reading from Page 86-6, Plaintiff's Exhibit 86-6, it  
08:57:27 10 indicates, "If you are an existing CPL Groeneveld customer,  
11 with the use Steadylube grease, we will honor your existing  
12 extended warranty. This means Lubecore will extend your  
13 current Groeneveld grease warranty from five years to the  
14 Lubecore six years. Lubecore will honor the replacement of  
08:57:48 15 parts under the Groeneveld warranty from the original date  
16 of purchase."

17 So your Lubecore warranty program warrants Lubecore  
18 EP-0 ALS systems, right?

19 **A.** That's correct.

08:58:06 20 **Q.** And extends the warranty to customers who use the  
21 Lubecore product?

22 **A.** That's only if -- only if a customer uses our grease  
23 to the Steadylube grease.

24 **Q.** Correct.

08:58:18 25 And also provides the same warranty for Groeneveld

Eissis - Cross

1 customers, people who are using Groeneveld Products?

2 **A.** Yeah, if a Groeneveld customer, if we are dealing with  
3 a Groeneveld customer, and the customer uses Groeneveld's  
4 Green Lube grease, that was a warranty that would extend the  
08:58:40 5 standard factory warranty to five years. In the market, we  
6 had, my sales people, a problem with that and our  
7 distributors because our customers, for example, would not  
8 want to switch to two different greases. So we came up with  
9 the plan to rebuild that because they were buying already  
08:58:59 10 the special grease. So now, for example, this happened at  
11 Town of Chondriomere, they bought Groeneveld Systems, and  
12 they had Green Lube grease in the system. With that grease,  
13 they would get an extended warranty.

14 **Q.** Sir, my --

08:59:14 15 **A.** An objection that they had was that because of the use  
16 of the grease, they would have to use a special grease with  
17 my system as well. So then they would say well, it would be  
18 difficult for them to administer. They have it all over the  
19 city and have to have two different greases in all the  
08:59:31 20 locations. And when a truck would come in with a Groeneveld  
21 system, they would have to use a Groeneveld Green Lube  
22 grease and if a truck would come in with the Lubecore  
23 system, they would have to use the down Steadylube grease  
24 from Lubecore.

08:59:45 25 **Q.** And so, sir, my question --

Eissis - Cross

1       **A.**       Basically made a commercial position to say okay, then  
2       we will also honor that warranty so that we would take the  
3       objection away from the customer to have to buy two  
4       different greases. That is what the warranty program is all  
09:00:00 5       about.

6       **Q.**       Right.

7               And if there are system failures because Groeneveld  
8       customers -- Groeneveld users -- let me -- let me rephrase  
9       this.

09:00:16 10              Lubecore tells Groeneveld customers if you use our  
11       grease in a Groeneveld product, we warrant the Groeneveld  
12       pump and product, right?

13       **A.**       Yeah, a customer.

14       **Q.**       It's just a yes answer. You gave the whole  
09:00:31 15       explanation. So we can kind of get to it if you just --

16       **A.**       Customer --

17       **Q.**       -- answer my questions.

18       **A.**       I'm doing that.

19       **Q.**       No. The answer I believe was yes. And so what  
09:00:41 20       happens then?

21                       THE COURT: He didn't give -- excuse me.

22                       THE WITNESS: Actually, I'd like to give the  
23       answer instead of you giving it for me.

24       **Q.**       Well, it's cross-examination.

09:00:48 25       **A.**       So when the Groeneveld customer uses Lubecore grease

Eissis - Cross

1 and the Groeneveld system, we will extend their warranty.

2 **Q.** Right. And so that means if something happens with  
3 the Groeneveld part in a pump, Lubecore people will go out  
4 and fix it or repair it or replace it with a Lubecore part,  
09:01:09 5 right?

6 **A.** No. We would typically end up putting a whole new  
7 pump on. Typically what we would need to do then is just  
8 swap the pump out, and if it's a reservoir glass, we could  
9 fix it with a reservoir or something, but if it's -- I would  
09:01:24 10 be on the hook for another pump if that -- if that were to  
11 happen. That's a risk I'm taking in order to get the rest  
12 of their business or their new business and their grease  
13 business because I would start selling all the grease to the  
14 customers then.

09:01:37 15 **Q.** So you market your grease as compatible with the  
16 Groeneveld pump because if people use your specialty grease  
17 with the Groeneveld pump, you will provide them with  
18 additional warranty benefits?

19 **A.** Yeah, I -- my Steadylube grease can also be used in a  
09:01:55 20 Groeneveld pump and Groeneveld grease can be used in my  
21 pump.

22 **Q.** The only competitor that you mention in your warranty  
23 materials is Groeneveld, not anybody else, right?

24 **A.** That is very obvious because other competitors do not  
09:02:17 25 have such programs. Only Groeneveld has.

Eissis - Cross

1 Q. But, you could give a warranty to other competitors  
2 who use your grease in their systems if they're compatible,  
3 if you were only -- if you were not only targeting  
4 Groeneveld users?

09:02:31 5 A. If the customer does not have a Groeneveld system and  
6 does not enjoy the extended warranty, it is not an objection  
7 that I have to deal with. So I'm not going to give it away  
8 if I don't have to give it away to get the business.

9 Q. Repairs and replacements are made by Lubecore  
09:02:48 10 personnel and representatives, distributors and installers  
11 if there are breakdowns in the pump or the Groeneveld system  
12 if the customer is using Lubecore grease?

13 A. Yeah.

14 Q. Correct?

09:02:59 15 A. We will repair any greasing system if we get a service  
16 call or the distributors get a service call, they will try  
17 to fix anything that a customer ask them to fix in order to  
18 sell labor and components, correct.

19 Q. So Lubecore people go out to work on Groeneveld  
09:03:17 20 systems, right?

21 A. That would happen if the customer asked us to do that,  
22 yes, for sure.

23 Q. And if part -- I'm not going to say it again.  
24 Lubecore has no employees in the United States, right?

09:04:16 25 A. No, there's no current employees of Lubecore in the

Eissis - Cross

1 United States, correct.

2 Q. And there weren't any back about a year ago either,  
3 were there?

4 A. No, that's correct.

09:04:29 5 Q. The distributors and the installers do all of the  
6 actual work in the servicing in the United States?

7 A. Actually, currently, we also deal with some customers  
8 direct in the United States, and we would actually go in  
9 from Canada to do some work. We have done the work in the  
09:04:48 10 United States as well.

11 Q. So that changed in the last year?

12 A. Yeah, that actually did, yeah.

13 Q. Yeah, okay.

14 So it could either be a Lubecore employee or  
09:05:00 15 technician or a Lubecore distributor or installer who goes  
16 out and does the servicing and the work, right? That's what  
17 you just said?

18 A. The Lubecore technician would be, a Canadian that  
19 would go into the United States, to perform the service at  
09:05:16 20 this moment or we would use the services of one of our  
21 distributors.

22 Q. And so those services could then, under a warranty  
23 issue as we -- you just testified about, those services on  
24 Groeneveld systems or pumps could be provided by actual  
09:05:34 25 Lubecore employees, not just the distributors, right?

Eissis - Cross

1 MR. ANASTOS: Objection, your Honor. We are  
2 way beyond the scope of my --

3 THE COURT: Really I don't even understand how  
4 this is relevant to this case, but the objection is  
5 sustained.

09:05:44

6 BY MS. MICHELSON:

7 Q. You provide technical training to the distributors  
8 here in the U.S.?

9 A. The ones that need it, yes.

09:05:54

10 Q. And sales tools and promotional materials?

11 A. As well, yeah.

12 Q. Extend credit to them?

13 A. Yeah.

14 Q. You educate them about the different systems, the lube  
15 systems?

09:06:04

16 A. When it's needed, yes.

17 Q. You gave them talking points to use during sales  
18 presentations?

19 A. I call it sales tools, yeah.

09:06:12

20 Q. You are involved in the sales presentation personally  
21 and in the preparation of promotional materials that they  
22 use to distribute to end users, right?

23 A. Can you repeat that one? You had a whole bunch in  
24 there. Can we do it one point at a time?

09:06:27

25 Q. You actively participate in sales presentations with

Eissis - Cross

1 your distributors in the U.S.?

2 **A.** I on occasion when asked, I'm in the area or they have  
3 something that they feel is important that I could assist, I  
4 would, yes.

09:06:40 5 **Q.** You provide -- I may have asked that one already. You  
6 join them at trade shows where Lubecore products are  
7 displayed? Talking about in the United States.

8 **A.** Yes, I will in the United States do that, yes.

9 **Q.** In fact, you always try to join them at the trade  
09:06:55 10 shows, right?

11 **A.** Yeah, I always try to make a point of being there, but  
12 I can make it to all shows.

13 **Q.** You pay for a portion of their attendance at trade  
14 shows?

09:07:04 15 **A.** I do assist in that as well. Not always. When asked,  
16 then we would give financial support.

17 **Q.** And you actually get involved in making sales calls to  
18 end user customers on occasion?

19 **A.** On occasion, yeah.

09:07:19 20 **Q.** Okay. Including to a company called Millis Transport?

21 **A.** I've been at Millis Transport I believe once, yeah.

22 **Q.** You knew them to be a Groeneveld customer, correct?

23 **A.** Yes.

24 **Q.** You have the right to control your U.S. distributors'  
09:07:43 25 dissemination of information about your products?



Eissis - Cross

1       **A.**     I don't know anything about my rights, really.

2       **Q.**     You agree that you probably have the right to control  
3       their dissemination of information about your products?

4               MR. ANASTOS:  Objection.

09:07:59 5               THE COURT:  Overruled.

6               THE WITNESS:  I do not know what my rights are  
7       as far as dissemination of my information, of how they use  
8       my information.

9               MS. MICHELSON:  Can I get that overhead for  
09:08:23 10       me?

11       **Q.**     Page 288 of your testimony.

12               "Question:  You could"  -- from Line 1, you could --  
13       "you control the right, you have the right to control the  
14       dissemination of information about your products by your  
09:08:40 15       United States distributors, correct?

16               "Answer:  Actually, I don't understand your question.  
17       Do I have the right to control what they say?

18               "Question:  Yes.

19               "Answer:  I don't know if I have the right.  I give  
09:08:51 20       them information to help them sell the product.  I probably  
21       have that right, yeah."

22       **A.**     Well --

23       **Q.**     I read that correctly?

24       **A.**     Yeah, I was confused then and I'm confused now.

09:09:05 25       **Q.**     You care what your distributors say about your product

Eissis - Cross

1 and how they market your product all over, right?

2 MR. ANASTOS: Beyond the scope, your Honor.

3 THE COURT: Yeah. Objection sustained.

4 Q. You promote your products in the United States by  
09:09:22 5 supporting and promoting your distributors here, right?  
6 That's how you do it?

7 MR. ANASTOS: Objection.

8 THE COURT: Sustained.

9 Q. You previously testified that people read on the  
09:09:34 10 Internet and that what appears on the Internet is important  
11 to business, to businesses images and to customer  
12 perceptions, correct?

13 MR. ANASTOS: Objection.

14 THE COURT: Objection sustained. Move on to  
09:09:49 15 something else.

16 Q. Have you taken any corrective action regarding the  
17 U.S. distributors' web site information as we've gone over  
18 in earlier testimony in the case?

19 MR. ANASTOS: Objection.

09:10:04 20 THE COURT: Sustained.

21 Q. Do you continue to supply your products to United  
22 States distributors notwithstanding what appears on the web  
23 sites?

24 MR. ANASTOS: Objection.

09:10:16 25 THE COURT: You can ask -- do you continue to

Eissis - Cross

1 distribute your products? Don't have to throw in the  
2 editorial.

3 THE WITNESS: Yes, I continue to distribute my  
4 products.

09:10:26 5 Q. You knew FSI had been a Groeneveld distributor for  
6 many years?

7 MR. ANASTOS: Objection.

8 THE COURT: Overruled.

9 MS. MICHELSON: You may answer.

09:10:37 10 THE WITNESS: Sorry. I don't understand in  
11 what context this question. Can you please repeat the  
12 question?

13 Q. Okay. You know that FSI was --

14 A. Okay. I didn't hear FSI. Sorry.

09:10:48 15 Q. Sometimes the --

16 A. Yeah. Go ahead. The question, please.

17 Q. You know that FSI was a Groeneveld distributor for  
18 many, many, many years?

19 A. Yes, I was aware that Groeneveld was a Groeneveld  
09:11:01 20 distributor.

21 Q. And you actually came into contact with FSI as part of  
22 your job with Groeneveld?

23 A. Yes, I met -- I met the people at FSI before I was  
24 with Groeneveld and during I was with Groeneveld.

09:11:16 25 Q. What do you mean before? You mean when you were

Eissis - Cross

1 distributing?

2 **A.** When I was distributing the products in the period  
3 from 1988 to, I guess, 2001, when I sold the first shares,  
4 and I've met them then, and I also have actually any  
09:11:35 5 dealings with them. Sometimes we work together a little bit  
6 on some jobs, but then in -- after 2004, when I was director  
7 of North American operations, then I actually visited them  
8 and I had a few visits there where they had contact with  
9 FSI, correct.

09:11:51 10 **Q.** Okay.

11 In direct examination, you talked about the Bijur  
12 pump, B-I-J-U-R, pump. In fact, you've never seen installed  
13 Bijur pump in the United States, have you?

14 **A.** I have not seen one. I've only seen it in trade  
09:12:06 15 shows, have not seen them on trucks, correct.

16 **Q.** Yeah.

17 And, in fact, Bijur is in the industrial automated  
18 lubrication application while Groeneveld is primarily in the  
19 transportation mobile and heavy equipment applications,  
09:12:20 20 right?

21 **A.** That is incorrect.

22 **Q.** It is?

23 **A.** Yeah. You go to the Bijur web site, it says Bijur  
24 goes mobile. Just think of the Bijur web site. It says

09:12:34 25 Bijur goes mobile. That means the mobile industry. Trucks

Eissis - Cross

1 and mobile heavy equipment.

2 Q. The Bijur products are not the Bijur product line, you  
3 determine that that is not a suitable product line for the  
4 intended applications either yours or Groeneveld, right?

09:12:55

5 A. Incorrect.

6 Q. They're not in different fields?

7 A. The pump that we are talking about.

8 Q. Are Bijur and Groeneveld in different fields?

9 A. No, they're not, especially not today.

09:13:18

10 Q. This is from testimony you gave under oath previously.

11 "Question: What does Bijur do?

12 "Answer: Bijur is in the automated lubrication  
13 systems business.

14 "Question: And that's exactly what Groeneveld does?

09:13:39

15 "Answer: In a different field, though. They are in  
16 the industrial automated lubrication and Groeneveld is in  
17 transportation, mobile, heavy."

18 And heavy equipment I read that correctly?

19 A. When was this document --

09:13:53

20 Q. Did I read that correctly?

21 A. From this document because --

22 Q. Well, does your testimony change, depending on what  
23 proceeding you're involved in? Did I read that correctly?

24 THE WITNESS: Yes, very much so.

09:14:03

25 MR. ANASTOS: Objection.

Eissis - Cross

1 THE COURT: Excuse me. Tell him the date that  
2 was given.

3 MS. MICHELSON: January of '08.

4 THE WITNESS: Oh, that explains it because  
09:14:13 5 Groeneveld just bought a company. It has -- went into a  
6 company that's called Volner, and they are in the industrial  
7 lubrication and Groeneveld also does industrial lubrication  
8 in the Netherlands. Bijur, within the last two years, came  
9 out with a product line, the Maxi-flow, and they got after  
09:14:34 10 that in the two years they got into on the web site. Now,  
11 they promote I go mobile -- Bijur is going mobile. So  
12 January, 2008 is -- how long ago is that? Anyway today, I'm  
13 answering this correctly and then I answered it correctly as  
14 well.

09:14:49 15 Q. Did you -- Lubecore did no independent testing on its  
16 EP-0 single-line system before releasing it to the market?

17 A. The only testing that was done by somebody you got  
18 from Martin in Korea where he said he had cycles made on the  
19 pump. We did not do field testing before we went into the  
09:15:33 20 market.

21 Q. You just put them on the trucks?

22 A. Yeah, that's right, yeah.

23 Q. You did no independent assessment of any testing Tae  
24 Sung may have done on the pumps either, right?

09:15:49 25 A. No, I believed Martin. I did not certify what he

Eissis - Cross

1 said.

2 Q. Those are the same pumps, though, that ended up with 7  
3 to 800 recalls?

4 A. Yeah. That was the issue here. It wasn't like Martin  
09:16:15 5 said, it wasn't 7 to 800. I can explain what the difference  
6 in the numbers come from.

7 Q. The 7 to 800 is what you testified to, correct?

8 A. That's correct.

9 Q. Right?

09:16:23 10 A. Yeah.

11 Q. Okay.

12 A. We ended up doing more than necessary because we  
13 didn't know exactly where the cut off on the sale numbers  
14 was, so.

09:16:30 15 Q. All of them had that quad ring, right?

16 A. Yeah, Martin testified that only the first 500 had  
17 quad ring. However, we replace more in the field. So we  
18 probably replaced some that were not necessary.

19 Q. You recalled at least 7 to 800 pumps?

09:16:48 20 A. No, we did not recall the pumps. I explained that  
21 very clearly already before, but if you want, I can do it  
22 again. We basically would switch pumps out when necessary.  
23 A lot of customers, we would send them a piston or an O-ring  
24 that they want to get into, like Bill from Fuel Systems, for  
09:17:05 25 example. He went in, and he took the pumps apart and

Eissis - Cross

1 repaired it on the spot in the weekend for the customers.

2 Another customer wouldn't want to do that, then we would

3 swap a pump out, and we would take a pump back and clean it

4 up and make it ready to be used for somebody else.

09:17:21 5 **Q.** 299 of your hearing testimony and date of that is just  
6 about a year ago.

7 **A.** Yeah.

8 **Q.** "Question: So you didn't do" -- Line 1, "Oh. So you  
9 didn't do any test on the grease in the field before you  
09:17:35 10 made claims about its quality, right?

11 "Answer: That is correct.

12 "Question: Okay. You do have a number of warranty  
13 claims on your ALS system?

14 "Answer: Yes, we do.

09:17:45 15 "Question: I believe you told me about 7 or 800 pumps  
16 have been recalled thus far?

17 "Answer: Yes, we had to recall a pump, correct.

18 "Question: Seven to 800 of them, right?

19 "Answer: Yeah, that's about it approximately --  
09:18:04 20 that's about approximately it, yeah, correct."

21 I read that correctly?

22 **A.** I think it's very similar to what I just told you.

23 **Q.** So you did no independent tests on the Lubecore grease  
24 either before putting that in the market and telling people  
09:18:22 25 to use it in their existing Groeneveld systems?



Eissis - Cross

1 MR. ANASTOS: Objection.

2 THE COURT: Overruled.

3 BY MS. MICHELSON:

4 Q. You may answer the question.

09:18:31 5 A. Okay. Can you please repeat what it was?

6 Q. I can.

7 A. Please do.

8 Q. I will. So you did no independent testing on the  
9 Lubecore grease either before making claims about its  
09:18:43 10 quality, did you?

11 A. Grease is very -- has very specific specifications and  
12 we did not field test the grease before we sold it. That's  
13 correct.

14 Q. And you did not evaluate independently anybody else's  
09:18:56 15 tests on the Lubecore grease before release -- making claims  
16 about its quality to the market, right?

17 A. Like buying gasoline in a store. Sales like octane  
18 89. I'm not doing an octane test when I buy gas.  
19 Specifications for the grease, Timken okay load, full layer,  
09:19:17 20 base or viscosity. When a company that's -- makes grease  
21 everyday tells me this is what's in the grease, I indeed did  
22 not do any further independent testing to verify whether  
23 those specifications that they gave me are correct. It's  
24 my --

09:19:31 25 Q. You put your label on it and you released it to the

Eissis - Cross

1 market, right?

2 **A.** That's correct.

3 **Q.** Okay.

09:19:42 4 And you did so and told people if they use it in the  
5 Groeneveld system, you would also warrant those products,  
6 right?

7 **A.** When they use the Steadylube grease in the Groeneveld  
8 system and they have an extended warranty program, we'll  
9 honor that. Correct, yeah.

09:21:10 10 **Q.** Showing you what we've marked as Plaintiff's Exhibit  
11 61-2, this is a pump that's a Lubecore reservoir or at least  
12 a reservoir with the Lubecore labeling, and a Groeneveld  
13 base, correct?

14 **A.** That's correct.

09:21:40 15 **Q.** Exhibit 55, that's an installed Lubecore pump?

16 **A.** Correct.

17 **Q.** Exhibit 60-1 and 60-2, that's an installed Lubecore  
18 pump?

19 **A.** This one here, yes. The other one, can you show me  
09:22:10 20 that again?

21 **Q.** Sure. It's -- I think it's the same but different  
22 angles.

23 **A.** Okay. Good enough. They're both Lubecore pumps?

24 **Q.** Yes, sir.

09:22:17 25 **A.** Yes.

Eissis - Cross

1 Q. Sorry, I just need to see something for one minute.

2 So, sir, when we asked you in the case for Lubecore  
3 financial information long, long ago, you finally gave us  
4 something during your deposition. Do you recall that?

09:23:43 5 A. I don't recall it, but if you show me, then we can  
6 take a look at that.

7 Q. Okay. This is what was handed to me right before  
8 your -- or in the middle of your deposition. We've marked  
9 it Exhibit 103. Do you recognize this?

09:23:58 10 A. Yeah, I recognize this document, yeah.

11 Q. And this is what you handed us?

12 A. Actually, Pierre LaBelle of our company made that.

13 Q. You did not make this, create this document?

14 A. No, I did not.

09:24:13 15 Q. You did not verify any of the numbers?

16 A. Yeah, I would have.

17 Q. You did?

18 A. Yeah.

19 Q. And this indicates that it's 2010 sales figures, year  
09:24:27 20 to date, as of the date of your deposition which was  
21 September of 2010, and then what you projected for the rest  
22 of 2010?

23 A. Says from the top 2010 sales, year to date, and then  
24 2010 sales projections, what date was this given? Can you  
09:24:50 25 tell me?

Eissis - Cross

1 Q. What date did we give you this? On September 20,  
2 2011?

3 A. September 20th.

4 MR. ANASTOS: That's --

09:25:02 5 MS. MICHELSON: 20 or 21st, 20th, 2010, sorry.

6 THE WITNESS: September 20, 2010, we gave you  
7 this. Okay.

8 Q. Okay.

9 A. Yeah, and there was no backup, no support, no  
09:25:13 10 supporting documentation, no financial records, nothing like  
11 that, just this summary, right?

12 MR. ANASTOS: Objection.

13 THE COURT: Sustained.

14 Q. When you handed this to us, you didn't give me anyone  
09:25:22 15 else, did you?

16 MR. ANASTOS: Objection.

17 THE COURT: The objection was sustained.

18 Q. And these were your projections and your sales  
19 figures, Lubecore's?

09:25:32 20 A. Projections would be, more or less, by Pierre and  
21 myself. I would have to look at it, yeah.

22 Q. Okay. And there's nothing about 2009 on there at all,  
23 correct?

24 A. That's correct.

09:25:45 25 Q. Are any 2009 sales reflected in this document, not

Eissis - Cross

1 withstanding the dates here, the 2010 and 2011 dates?

2 **A.** I think that in this document, from a reason, there's  
3 no 2009 figures.

4 **Q.** I didn't really hear what you said.

09:26:14 5 **A.** It appears there's no 2009 figures.

6 **Q.** That's not my question. It does appear there are no  
7 2009 figure, but I want to clear this up because there was a  
8 suggestion that maybe there were. Are there any 2009 sales  
9 figures in this document, Exhibit 103?

09:26:31 10 **A.** Can I see it here? Because it's a little fuzzy to  
11 read.

12 MS. MICHELSON: Yeah, can we give him another  
13 copy? You can leave this here.

14 THE WITNESS: There's the green one we looked  
09:26:46 15 at yesterday that looks a lot like it.

16 MR. KUNSELMAN: May I, your Honor?

17 THE COURT: Sure.

18 THE WITNESS: Okay. Okay. Okay.

19 Now, I understand. I think there's a typo here. Can  
09:27:14 20 you go back to the other one?

21 **Q.** This is the same thing, just has my handwritten notes  
22 from Gail's testimony on it. But, it's the same document,  
23 Exhibit 103. Are there 2009 numbers reflected in here,  
24 despite the dates or the dates here, correct?

09:27:29 25 **A.** Yeah, I think what the issue here is that the 2010

Eissis - Cross

1 year to date is actually probably the 2009 sales and the  
2 2010. I think it's a typo. Says 2010 year to date. That  
3 might be the 2009, and then 2010 projected annual, that  
4 would make sense then and 2011 projected annual. So it's  
09:27:57 5 possible that 2010 sales year to date, there's a typo in the  
6 top there, but I would have to verify that.

7 **Q.** So is there a typo or not, is it --

8 **A.** I would now have to go back because it seems that if  
9 you ask me for numbers in 2010, that that was correct,  
09:28:16 10 right? That we would have the 2009 numbers. So in  
11 September, it would seem logical to me that the 2010 sales  
12 year to date, that should be 2009 or something, 2009, 384,  
13 and then the --

14 **Q.** I'm just trying to figure out if -- it's your  
09:28:38 15 testimony now that this column where it says 2010 sales year  
16 to date should have said 2009, that this column, 2010 sales  
17 projected annual should have been full 2010, and the 2011  
18 sales projected annual are your projections for 2011? I  
19 just want to know if this column here, 1, 2, 3, 4, 5, this  
09:29:09 20 column pertains to 2009 sales because there was a suggestion  
21 in the earlier testimony that it did, and that there was a  
22 problem with Groeneveld calculating their damages based on  
23 this being 2010 sales. And I want to -- I'm just asking.

24 **MR. ANASTOS:** Objection.

09:29:29 25 **THE COURT:** Objection sustained.

Eissis - Cross

1 Q. Are these -- is this supposed to be for 2009 or is it  
2 2010?

3 A. You know, I am confused right now. I would really  
4 have to go back to the bookkeeping and get this verified  
09:29:42 5 because I'm confused at this point.

6 Q. Okay. Well, the issue actually --

7 A. So I cannot answer that question.

8 Q. Okay. The issue actually came up at your deposition,  
9 and we'll refresh your recollection if I read your testimony  
09:29:58 10 about this. Because I asked you about it, and you -- you  
11 said there was no typo.

12 A. Okay. Then -- when was the deposition?

13 Q. September 20, 2010. I'm going to hand you a document  
14 that was handed to me this morning for the first time. It's  
09:30:17 15 Exhibit 23. That's what we marked it during your  
16 deposition. Can you please tell us what that is? This is  
17 Lubecore International, Inc. 2010, USA, actual sales in 2011  
18 sales projections. Okay. Who created this document, Pierre  
19 LaBelle.

09:30:36 20 So Lubecore did -- your company produced this  
21 document?

22 "Answer: Yeah.

23 "Question: And what is -- what is this, are these the  
24 different distributors in the U.S. that are identified here?

09:30:49 25 "Answer: Yeah, that's correct.

Eissis - Cross

1 "Question: Okay. There might be -- this is my  
2 question to you during your deposition, okay, there might be  
3 a typo here, but this is 2010 sales, there are two columns  
4 for 2010 sales, maybe it isn't a typo. I don't really  
09:31:04 5 understand what these columns mean. Can you explain the  
6 differences?

7 "Answer: Yeah, the 2000 -- 2010 sales would be year  
8 to date. Yeah, so it -- so it says year to date below that.  
9 Uh-huh, I say.

09:31:24 10 "Answer: Year to date."

11 So that means until this was taken, until this moment  
12 in time, so by now it would be accurate if taken as of last  
13 week. Okay. Then we move on.

14 Then there's the 2010 sales, this is your answer,  
09:31:42 15 "2010 sales so what we project to do for the end of the  
16 year."

17 Does this refresh your recollection that there's no  
18 typo on this document?

19 **A.** Actually, you know what? It doesn't refresh my  
09:31:52 20 recollection at all.

21 **Q.** Do you recall testifying during your deposition that  
22 there was no typo and that there were no 2009 sales on the  
23 summary that Lubecore provided at your deposition? Did you  
24 testify that late in your degrees?

09:32:10 25 **A.** Can I see the deposition myself? Can I read it?



Eissis - Cross

1 Q. I just read it, but we can do it again. Maybe we  
2 should get bigger so people can read it this way.

3 "Question: Okay. Page 237, I'm going to hand you a  
4 document that was handed to me this morning.

09:32:48 5 "Answer: Okay.

6 "Question: For the very first time it's Exhibit 23?

7 "Answer: Okay.

8 "Question: Can you please tell us what this is?"

9 A. This is the one you gave me, is 103.

09:32:59 10 Q. Yeah. It's marked for trial as 103. At your  
11 deposition, it was Exhibit 23.

12 And if you need to see your deposition exhibit with  
13 the sticker on it that says 23 --

14 A. Yeah, I'd like to see that.

09:33:12 15 Q. -- I can bring that up, too.

16 A. I'd like to see that.

17 MS. MICHELSON: Can you get that for me,  
18 somebody? But, I'll keep going so we don't interrupt.

19 THE WITNESS: Actually, I would first like to  
09:33:21 20 see that.

21 Can I get maybe get a bit of water? My mouth is  
22 getting quite dry. I have a bottle of water in my bag  
23 there, Tom.

24 MS. MICHELSON: Counsel, will you stipulate  
09:34:29 25 that this is what the document was marked, Exhibit 23,

Eissis - Cross

1 during the witness' deposition.

2 MS. ZUJKOWSKI: Yeah, we'll stipulate it's the  
3 exact same document.

09:34:50

4 MS. MICHELSON: Will you stipulate it was part  
5 of Lubecore's document production, please?

6 MS. ZUJKOWSKI: Yes, Debbie.

7 MS. MICHELSON: Thank you.

8 THE WITNESS: For what purpose?

9 MS. ZUJKOWSKI: Also stipulate to the typo.

09:35:02

10 MS. MICHELSON: There is no typo. There is  
11 no -- all right. I'm going to read from here.

12 Q. Page 237, Line 16.

13 "Question: I'm going to hand you a document that was  
14 handed to me this morning.

09:35:21

15 "Answer: Okay.

16 "Question: For the first time, it's Exhibit 23.

17 "Answer: Okay.

18 "Question: Can you please tell us what it is?

19 "Answer: This is Lubecore International Inc.'s 2010  
20 USA actual sales and 2011 sales?

09:35:33

21 "Question: Okay. Who created this document?

22 "Answer: Pierre LaBelle.

23 "Question: So lube -- from -- so Lubecore did,  
24 Lubecore your company, produced this document?

09:35:53

25 "Answer: Yeah.

Eissis - Cross

1 "Question: And what is -- what is -- are these the  
2 different distributors in the U.S. that are identified here?

3 "Answer: Yeah, that's correct.

4 "Question: Okay. And then -- and there might be a  
09:36:11 5 typo here, but this is 2010 sales. There are two columns,  
6 two columns for 2010 sales. Maybe it isn't a typo. I don't  
7 really understand what those columns mean. Can you explain  
8 the differences?

9 "Answer: Yeah, yes. The 2010 sales would be the year  
09:36:34 10 to date. Yeah, so it says year to date below that. Can you  
11 read that?

12 "Question: And I say uh-huh and you say --

13 "Answer: Year to date. So that means until this was  
14 taken, the moment in time. So by now, it will be accurate  
09:36:53 15 if it was taken last week. The next --

16 "Question: Wait. What did you just -- this was  
17 created last week?

18 "Answer: Yeah. This would have been created whenever  
19 it was created by Pierre.

09:37:08 20 "Question: Well, I'm asking you when was it created  
21 by Pierre?

22 "Answer: Within the last few weeks.

23 "Question: Created within what? I had trouble  
24 hearing, understanding you during the --

09:37:20 25 "Answer: The last few weeks.

Eissis - Cross

1 "Question: The last few weeks?

2 "Answer: I've been on the road. I do not know  
3 exactly when Pierre created it. Then there's the 2010  
4 sales. So what we project to do for the end of the year,  
09:37:34 5 the 2010 projections. So the --

6 "Question: So the year to date sales will be current  
7 through -- what month is this, is this September? So what?

8 "Answer: Probably August or so.

9 "Question: The end of --

09:37:51 10 "Answer: End of August, probably, probably, yeah.

11 "Question: And that's gross sales of \$384 and change?

12 "Answer: Correct, yeah, correct.

13 "Question: And you think between September and the  
14 end of the year -- and we were in 2010 at the time?

09:38:09 15 "Answer: We're going to bring that to a million,  
16 yes."

17 That was your answer. I read that correctly?

18 **A.** Actually that's quite helpful. That refreshes my  
19 memory.

09:38:21 20 **Q.** Right. So there are no 2009 sales figures in Exhibit  
21 103?

22 **A.** I think -- I think that is correct, yeah.

23 **Q.** Okay. And then no additional financial information  
24 from Lubecore was provided until I guess a day and a half  
09:38:44 25 before trial, right?

Eissis - Cross

1       **A.**     I think my lawyers could answer that better.

2       **Q.**     And this was what was provided in your exhibit book,  
3       what's marked DX-X, meaning Defendant's Exhibit X-1, 2, 3,  
4       4, correct? This comes from your Exhibit book, right?

09:39:20 5       **A.**     That's possible. I mean -- I have -- I've never gone  
6       through the exhibit book, but I'm sure --

7                   MS. MICHELSON: Counsel, will you stipulate  
8       that this was in your exhibit book provided to us two days  
9       before trial?

09:39:34 10            MS. ZUJKOWSKI: We'll stipulate that it was in  
11       our exhibit book. I think you're wrong on the date  
12       actually. But, we're looking for the transmittal e-mail if  
13       you need it. I don't see how it's relevant.

14            MS. MICHELSON: It appeared in the exhibit  
09:39:44 15       book. All right.

16       BY MS. MICHELSON:

17       **Q.**     And these figures are not the same as those in Exhibit  
18       103, right?

19       **A.**     Put it beside them so I can answer that. I couldn't  
09:40:02 20       see as quick as you went so --

21       **Q.**     The numbers in Exhibit 103 in your exhibit book are  
22       not the same as those in Exhibit -- sorry.

23       **A.**     I'm staring at a blank page here.

24       **Q.**     I'm just asking you if you know.

09:40:25 25       **A.**     Actually I'm staring at a blank page. If you could

Eissis - Cross

1 show me both beside each other, I can take a look and see if  
2 they're the same or not.

3 Q. You testified about it on direct exam. I'm just  
4 asking you.

09:40:37 5 A. Show me that.

6 Q. I'm just -- I'll -- I'll show you in a minute if I  
7 decide to do that. But, I'm just asking you your sales  
8 figures in Defense Exhibit X are not the same as the numbers  
9 in Plaintiff's Exhibit 103, right?

09:40:53 10 A. Actually, I'm looking at a blank page and I do not  
11 know without seeing those pieces of paper in front of me. I  
12 cannot answer your question. I'm sorry. I'm looking at a  
13 white piece of paper.

14 Q. I heard you say that. You did not prepare Defense  
09:41:18 15 Exhibit X?

16 A. What is Defense Exhibit X? Actually I can't read the  
17 numbers either right now. It's very blurry. No, I did not  
18 prepare this myself. That's correct.

19 Q. There are no financial statements attached to Defense  
09:41:38 20 Exhibit X, right?

21 A. That's correct.

22 Q. There are no tax returns attached to Defense Exhibit  
23 X, correct?

24 A. That seems to be correct, yeah. I don't know whether  
09:41:52 25 they were or not, but -- it wouldn't make any sense that the

Eissis - Cross

1 tax returns -- because we're Canadian company and this is  
2 only about business in the U.S., so this would have to be  
3 singled out as U.S. sales only, like we're talking about  
4 U.S. sales.

09:42:16

5 **Q.** Are you -- did you just say that your tax --

6 **A.** Financial activities in the U.S. So my tax returns  
7 would not have separate columns in there about activity in  
8 the USA. It would just be total revenue that we sent to  
9 revenue Canada that would have no impact on activity in the  
10 USA.

09:42:34

11 **Q.** There are no financial statements attached to the  
12 document, right?

13 MR. ANASTOS: Objection.

14 THE WITNESS: That's correct, yeah.

09:42:40

15 THE COURT: We've gone over this.

16 MS. MICHELSON: Okay. I just have --

17 **Q.** I just have to ask you a couple questions more about  
18 this document, Defendant's Exhibit X, and I'll wrap up soon.  
19 You claim all of these figures here in this Exhibit X relate  
20 to the sales of your single-line zero grease EP-0 ALS  
21 products?

09:43:37

22 **A.** Can you move the page over a little bit? Just give me  
23 the page so I can take a look at it so I can see the whole  
24 thing all at once.

09:43:50

25 **Q.** We can do both. Do we have an extra copy for him to

Eissis - Cross

1 look on at the stand? Can somebody bring to him, please?

2 **A.** Now, I can't read it, yeah.

3 **Q.** We want the jurors to see it as well.

4 **A.** I can't read those numbers.

09:44:01 5 **Q.** We're going to bring a copy so you'll have it in your  
6 hand.

7 **MR. KUNSELMAN:** May I, your Honor?

8 **THE WITNESS:** Okay.

9 **Q.** Here's my question. My question is --

09:44:16 10 **A.** Page DX-X.

11 **Q.** You claim all of these figures in DX-X relate to sales  
12 of your single-line zero grease EP-0 ALS products, right?

13 **A.** 2009 to 2010 financials summary 2009 to 11. Total  
14 revenue. Yeah, I believe that this is -- oh, yeah for sure.

09:44:54 15 Yeah, the sales here, revenue EP-0 single-line, the fourth  
16 column over, yeah.

17 **Q.** Okay.

18 Lubecore also sells related products to the same  
19 customer -- are you with me?

09:45:09 20 **A.** Yeah.

21 **Q.** I'm not going to ask the document right now.

22 **A.** Excuse me?

23 **Q.** Are you with me?

24 **A.** Yes, I'm listening.

09:45:16 25 **Q.** Okay.



Eissis - Cross

1       **A.**     You're asking questions.

2       **Q.**     Lubecore also sales related products to the same  
3 customers that it sells these EP-0 products to, right?

4       **A.**     What do you mean related products?

09:45:28 5       **Q.**     Related -- other ALS products?

6       **A.**     Yes, we do, yeah.

7       **Q.**     Okay. And there's no indication in Defense Exhibit X  
8 that anyone to whom you sold the related products are not  
9 also Groeneveld customers, right? There's no indication in  
09:45:45 10 this document to the effect I just described, is there?

11                   MR. ANASTOS: Objection. Not Groeneveld  
12 customers? I didn't understand.

13                   THE COURT: I didn't understand it either.

14                   MS. MICHELSON: I can rephrase it. I'm  
09:45:55 15 trying.

16       BY MS. MICHELSON:

17       **Q.**     There's no indication in the exhibit that anyone to  
18 whom you sell EP-0 products are not also Groeneveld  
19 customers, is there?

09:46:15 20                   MR. ANASTOS: Objection.

21                   THE COURT: Sustained.

22       **Q.**     You don't dispute that people to whom you -- Lubecore  
23 sells EP-0 products have also have been or are Groeneveld  
24 customers, do you? You don't dispute that, do you?

09:46:29 25       **A.**     Actually, can you please tell me what you'd like to

Eissis - Cross

1 know instead of going so difficult? Like -- what would you  
2 like to know?

3 **Q.** You admit that Lubecore customers of EP-0 products are  
4 also Groeneveld customers of the same line of products?

09:46:52 5 **A.** The list of distributors that we have on here, on  
6 this -- these people, I thought there was one earlier, yeah  
7 on this document here. These people bought automatic  
8 greasing systems from me.

9 **Q.** And from Groeneveld, and from Groeneveld, correct?

09:47:07 10 **A.** Not all of them, but --

11 **Q.** And from Groeneveld, right?

12 **A.** Some of these people buy -- well, some of these people  
13 used to buy, maybe still buy some parts from Groeneveld  
14 today, but some of these -- I sell greasing systems to those  
09:47:21 15 companies there, except for Frank's. Only got a demo once  
16 and so --

17 **Q.** And the end users of Lubecore's EP-0 products are --  
18 it's the same target as Groeneveld?

19 MR. ANASTOS: Objection.

09:47:38 20 THE COURT: Overruled.

21 THE WITNESS: So you're -- first you ask me  
22 about these customers.

23 **Q.** It's another question. It's a different question.

24 **A.** You're talking about two different customers. The  
09:47:47 25 first question was --

Eissis - Cross

1 Q. I know I am.

2 A. The first customer -- well, it's very unclear to me  
3 the way you ask your question. Okay? The way you ask your  
4 question. These customers here are people that are  
09:47:57 5 distributors that I sell to, and those people sell to other  
6 people again that I don't sell to, and I have some knowledge  
7 of, but I don't know their customer base. I don't know  
8 Bill's customers. I know a few of them, but that's about  
9 it. So --

09:48:12 10 Q. Well, you told us already you know about at least  
11 Millis Transport, and they were -- so the question -- this  
12 is my question to you.

13 A. Yeah.

14 Q. You don't dispute that end users of your products,  
09:48:23 15 your EP-0 products, are also end users of Groeneveld's  
16 similar products, right?

17 A. They can be, yeah.

18 Q. Okay.

19 A. Yeah.

09:48:32 20 Q. Okay.

21 Mr. Eissis, you testified quite a bit about the  
22 technical aspects of the various -- of the -- well, the two,  
23 ALS pumps, correct?

24 A. The technical aspect of --

09:49:04 25 Q. You testified about the technical parts of your pump.

Eissis - Cross

1 My question to you is this.

2 You instructed Martin Vermeulen to make a pump for  
3 Lubecore, right?

4 **A.** Yeah.

09:49:18 5 **Q.** You told him to make a system for Lubecore, right?

6 **A.** Pardon me, yeah.

7 **Q.** Okay. You told him what you wanted, right?

8 **A.** I gave him the features that I wanted my pump to have,  
9 correct.

09:49:36 10 **Q.** And you told him what you liked in the Groeneveld and  
11 the few things that you wanted different, right?

12 **A.** I told him what I like about the Groeneveld pump and  
13 other pumps in the industry as well.

14 **Q.** And the Lubecore pump doesn't look like the other  
09:49:55 15 pumps in the industry, doesn't look like the Ecostar, does  
16 it?

17 **A.** We went there yesterday. I -- I'm -- I'm testifying  
18 that my -- that the Lubecore pump looks more like Groeneveld  
19 pump than Ecostar pump looks like a Groeneveld pump or like  
09:50:11 20 my pump.

21 **Q.** You agree that the Lubecore pump looks like the  
22 Groeneveld?

23 **A.** Yes.

24 **Q.** Okay.

09:50:16 25 And that's okay with you because you know that

Eissis - Cross

1 Groeneveld has an international reputation for quality,  
2 right?

3 MR. ANASTOS: Objection.

4 THE COURT: Objection sustained.

09:50:31 5 Q. You voiced no objection at any time to it looking so  
6 similar to the Groeneveld pump, did you?

7 A. No, I didn't.

8 Q. You would not want your pump to look like a product  
9 that had a bad reputation, right?

09:50:51 10 MR. ANASTOS: Objection.

11 THE COURT: Overruled.

12 THE WITNESS: See when you talk about a bad  
13 reputation, it depends on who you talk to.

14 Q. Well, I'm talking to you. I'm asking you the  
09:51:01 15 question. My question to you, Mr. Eissis?

16 THE COURT: Excuse me. Let him answer the  
17 question.

18 MS. MICHELSON: Well --

19 THE WITNESS: When you talk to a customer that  
09:51:08 20 have Groeneveld pumps fall off in front of the wheels and  
21 drove over it and splatter it all over the road, Groeneveld  
22 does not have a good reputation. So in a case like that,  
23 you know, it's probably a disadvantage. In other  
24 advantages -- other areas where they are happy with it, it  
09:51:23 25 doesn't really matter. So really it can go both ways, also

Eissis - Cross

1 people that are not happy with the Groeneveld systems. So  
2 it goes both ways.

3 Q. You would not want your pump to look like something  
4 that had a bad reputation in the marketplace, would you?

09:51:46 5 A. Preferably not, no.

6 Q. And you say in your web site that you understand how  
7 long it takes to build a reputation in the marketplace, 20  
8 years to build a reputation and only five minutes to ruin  
9 it, right?

09:52:01 10 A. Yeah, that's -- that's true.

11 Q. And you've testified that you wanted to forge an  
12 independent corporate image and identity for Lubecore?

13 A. Yeah.

14 Q. And you -- and for that reason, you want your pump to  
09:52:14 15 look distinctly different than the Groeneveld?

16 A. Can you show me where it says that?

17 Q. Can you say it now?

18 A. No, I'd like to show -- I'd like you to show me in  
19 what context and where you find that information.

09:52:32 20 Q. So I'm asking you a question.

21 A. You're reading from something there and I like to know  
22 where you read from.

23 Q. I am reading from my outline and I'm not going to show  
24 that to you. My outline. I'm asking you the question. And  
09:52:44 25 I can find the testimony if I need to but my question to you

Eissis - Cross

1 right now, sir, is --

2 **A.** You said something to the extent that I --

3 **Q.** And for that reason, you wanted your pump to look  
4 distinctly different than the Groeneveld because you wanted  
09:52:57 5 to build your own make and model and develop your own brand,  
6 right?

7 **A.** I want to develop my own brand.

8 **Q.** And for that reason, you want your pump to look  
9 distinctly different from the Groeneveld?

09:53:13 10 **A.** I do not understand where you're going with this.

11 Where are you getting this?

12 **Q.** Do you want it to look exactly the same as the  
13 Groeneveld?

14 **A.** I never said it before. So show me where I said that.

09:53:22 15 You talk to me for ten hours, asked me thousands of  
16 questions, if not 100,000. So if you say that I said that,  
17 and I'd like to say when did I say that, verify that, yeah,  
18 and what context is that and ask me a question.

19 **Q.** You wanted your pump to look just like Groeneveld's,  
09:53:47 20 didn't you? You can't answer the question because you  
21 wanted your pump to look exactly like Groeneveld?

22 MR. ANASTOS: Objection.

23 THE COURT: Overruled.

24 THE WITNESS: No. I did not instruct that my  
09:53:58 25 pump had to look like a Groeneveld.

Eissis - Cross

1 Q. I didn't ask if you instructed that because you  
2 certainly didn't instruct him to the contrary. My question  
3 is you wanted your pump to look exactly like Groeneveld's,  
4 didn't you, and that's why it does?

09:54:10 5 A. It doesn't matter to me.

6 Q. Well, it would matter to you. We just established if  
7 Groeneveld had a crummy reputation, it would matter to you  
8 then, wouldn't it? You just said it would? You just said  
9 that?

09:54:26 10 A. Yeah, that's correct, I said that.

11 Q. Okay. So it does matter to you, doesn't it?

12 A. Yeah, if it would look like -- the Groeneveld pump had  
13 a really bad reputation, I would not like that, correct.

14 Q. You know they have a good reputation. You carried  
09:54:42 15 that product line from 1988 to 2007, right? You know they  
16 have a good reputation?

17 A. Yeah, different versions of it, I did, yeah.

18 Q. You know that they're recognized in all over the place  
19 among people who were involved in the ALS industry? You  
09:55:00 20 know that, don't you?

21 A. Yeah, Groeneveld is recognized in -- you know,  
22 especially with the customers, yeah.

23 Q. You can -- you can identify a pump as a Groeneveld by  
24 the shape of it, can't you? You worked with the thing for  
09:55:17 25 all those years, you can identify it, you recognize it as a



Eissis - Cross

1 Groeneveld when you see it, right?

2 **A.** Yes, I do.

3 **Q.** Because of the shape of it, right, the silhouette, the  
4 outline, the way it looks, you recognize it on sight?

09:55:31 5 **A.** And also because the name and the labeling on it.

6 **Q.** Is it your testimony here in court that you would not  
7 recognize that as a Groeneveld pump if you couldn't read the  
8 label that says Groeneveld?

9 **A.** Drove by it 100 kilometers an hour on the highway,  
09:55:46 10 yeah. Actually, I would still say it's a Lubecore pump,  
11 yeah, because of the red colors.

12 **Q.** So, sir, you wanted it to look like the Groeneveld  
13 because you knew about Groeneveld's reputation, market  
14 presence, and place in the industry, didn't you?

09:56:07 15 **A.** I have no objection with it looking like a Groeneveld.

16 **Q.** In fact, you like that, and you like enjoying the  
17 benefits of that, don't you?

18 **A.** It's a good pump.

19 **Q.** Otherwise, you would make it differently, wouldn't  
09:56:22 20 you?

21 **A.** It would have been up to Martin.

22 MS. MICHELSON: I have nothing further at this  
23 time.

24 THE COURT: Any redirect?

09:56:36 25 MR. ANASTOS: We have no questions for

Eissis - Cross

1 Mr. Eissis.

2 THE COURT: Thank you, Mr. Eissis. You can  
3 step down. You may call your next witness.

4 MR. ANASTOS: Your Honor.

09:56:54 5 THE COURT: Sure.

6 MR. ANASTOS: We're only calling the witness  
7 to authenticate the trade registration form pulled off the  
8 Internet. If there's no dispute about the authentication  
9 then we don't have to call this witness.

09:57:06 10 MS. MICHELSON: I mean I'm happy to talk to  
11 this person and see if I have any issue.

12 THE COURT: Here, take a minute. You want to  
13 stand up and stretch, be my guest.

14 (Counsel conferring.)

10:01:03 15 THE COURT: You should take a break since they  
16 took a break you might as well.

17 A JUROR: Amen.

18 THE COURT: Chris will take you in.

19 (Thereupon, a recess was taken.)

10:17:59 20 THE COURT: Go ahead.

21 MR. ANASTOS: Lubecore calls Ms. Susan Coker.  
22 Step over here if you will. Raise your right hand for me.

23

24

25

Coker - Direct

1 SUSAN COKER,  
2 of lawful age, a witness called by the DEFENSE,  
3 being first duly sworn, was examined  
4 and testified as follows:

10:18:28 5 DIRECT EXAMINATION OF SUSAN COKER

6 THE COURT: Could you tell us your full name  
7 and spell your last name.

8 THE WITNESS: My full name is Susan  
9 Draeger-Coker, C-O-K-E-R.

10:18:36 10 THE COURT: Thank you.

11 BY MR. ANASTOS:

12 Q. Good morning, Ms. Coker.

13 A. Good morning.

14 Q. Ms. Coker what is your occupation?

10:18:42 15 A. I'm a paralegal.

16 Q. How long have you been a paralegal?

17 A. Going on 25 years.

18 Q. Where are you currently employed?

19 A. Ulmer and Berne.

10:18:50 20 Q. And you work with me at Ulmer and Berne?

21 A. Yes, I work in the department that you are in.

22 Q. Which is the business litigation department?

23 A. Yes, and I also assist occasionally on intellectual  
24 property matters.

10:19:04 25 MR. ANASTOS: Can we have the screen, your

Coker - Direct

1 Honor?

2 Q. Ms. Er, I've got on the screen document in this case  
3 that's been marked as Defendant's Exhibit Z?

4 THE COURT: Speak up a little bit.

10:19:26 5 Q. I have on the screen document that's been marked as  
6 Defendant's Exhibit Z, do you see that. Z as in zebra?

7 A. Yes.

8 Q. Are you familiar with this document?

9 A. Yes.

10:19:34 10 Q. Did I ask you to find this document?

11 A. Yes, you did.

12 Q. What did you do?

13 A. I went on the web site for the -- it's called WIPO,  
14 it's the World Intellectual Property Organization, and from  
10:19:49 15 there, you can search for various trademarks in multiple  
16 countries in the world, and that search led me to the  
17 Benelux Office of Intellectual Property, and that would be  
18 Belgium, Belgium, the Netherlands, and Luxembourg, and at  
19 their web site, I did a web search for Lubecore, and came up  
10:20:16 20 with this finding.

21 Q. And then you printed it out?

22 A. Printed it out, e-mailed it to you.

23 Q. Do you have any dispute that the document you're  
24 looking at is the document you e-mailed to me?

10:20:29 25 A. No.

Coker - Cross

1 MR. ANASTOS: No further questions.

2 THE COURT: Thank you. Cross-examination?

3 MS. MICHELSON: Very quickly. Your Honor,  
4 thank you.

10:20:43

5 CROSS-EXAMINATION OF SUSAN COKER

6 BY MS. MICHELSON:

7 Q. Hi. How are you, Ms. Coker?

8 A. Good.

10:20:52

9 Q. Ms. Coker, you have no personal knowledge as to why  
10 this registration was made, the one that's in the exhibit?

11 A. No, ma'am.

12 Q. And you have no knowledge of the lawfulness of the  
13 registration under European laws or regulations, or those  
14 that govern the three places?

10:21:08

15 MR. ANASTOS: Objection, beyond the scope.

16 THE COURT: Yeah, the objection is sustained.

17 Q. You did other searches as well for additional  
18 information and this is the only thing you could find,  
19 correct?

10:21:17

20 A. Correct.

21 MS. MICHELSON: Nothing further, your Honor.

22 THE COURT: Thank you. Ms. Coker, thank you  
23 ma'am. That was easy, huh?

24 THE WITNESS: Yes, it was.

10:21:24

25 THE COURT: Your first time testifying.

1 THE WITNESS: Yes, sir.

2 THE COURT: In all those years.

3 THE WITNESS: Yes.

4 THE COURT: Wasn't so bad.

10:21:28 5 THE WITNESS: Usually I'm one of those people  
6 out there, so.

7 (Laughter.)

8 THE COURT: All right. Thanks. Anything  
9 further?

10:21:34 10 MR. ANASTOS: Your Honor, we have no more  
11 witnesses at this time. We'll be prepared to move our  
12 exhibits.

13 THE COURT: Okay. The Defense has rested. Is  
14 there anything further on behalf of the Plaintiff?

10:21:41 15 MS. MICHELSON: There is going to be, your  
16 Honor. Yes, our -- we have a rebuttal witness that is due  
17 to be here I think around 1:15 or so.

18 THE COURT: Looks like we missed him.

19 MR. ANASTOS: Dr. Rashidi. This is the  
10:21:55 20 Cleveland State University guy.

21 THE COURT: Hang on. We'll -- since they  
22 rested, we'll take our -- I say short, but you know what  
23 that means now, I'm sure. Don't you? When I say short,  
24 like a lawyer, I just have two questions and an hour later,  
10:22:08 25 you're going what. Okay.

1           We'll have a short recess because they rested. We'll  
2 go through their exhibits a little bit, and we'll be ready  
3 to go to conclude the case and you'll be getting it fairly  
4 quickly. So keep in mind the admonition. It's still  
10:22:21 5 important. You may or may not have heard all the testimony  
6 you're going to hear. Fair enough? Okay. Chris, could you  
7 take them back.

8           (Proceedings in the absence of the jury:)

9           THE COURT: Okay. What about this witness?

10:23:06 10           MR. ANASTOS: I believe he's being called as a  
11 rebuttal expert under Rule 26, and we didn't put any expert  
12 on.

13           MS. MICHELSON: He's been called -- is an  
14 expert, and he's being called to rebut testimony that was  
10:23:17 15 put in in the Defense's case-in-chief of Mr. Eissis and also  
16 of Mr. Vermeulen, who was -- whose testimony was presented  
17 on functionality issues and technical issues, and he speaks  
18 to all of those, including frankly, your Honor,  
19 Mr. Vermeulen's lack of basic knowledge that would have --  
10:23:45 20 his demonstration of a lack of basic knowledge about  
21 engineering principles, such that there's no way he even  
22 designed the Lubecore pump.

23           MR. ANASTOS: These questions --

24           MS. MICHELSON: More as well, your Honor, but  
10:23:58 25 given that they've -- they've offered -- they've offered

1 expert like testimony through Mr. Vermeulen. And it is  
2 appropriate for -- and we are seeking in a rebuttal case to  
3 demonstrate that the expert opinions and knowledge and  
4 testimony or the expert like testimony offered by  
10:24:23 5 Mr. Vermeulen should be -- should be considered in the --  
6 should be evaluated with Dr. Rashidi's input. They put him  
7 on as their expert like person on these issues to talk about  
8 functionality and all sorts of things, and Dr. Rashidi is  
9 prepared to discuss it. We did have him promptly prepare a  
10:24:50 10 report. As soon as we got the testimony with Mr. Vermeulen  
11 in the deposition, which was on a Tuesday, we -- we got  
12 doctor -- because we didn't know what he was going to say  
13 before. We got Dr. Rashidi on board to evaluate the  
14 testimony. When the transcript became available, we ordered  
10:25:09 15 it expedited for that purpose and provided them a report, I  
16 believe on the Sunday, and they've had it since then, and  
17 that is our intent.

18 THE COURT: So he can testify as to the  
19 Groeneveld product because that's at issue in the case,  
10:25:25 20 isn't it? Whether the Groeneveld product is functional or  
21 not, not whether Lubecore is functional or nonfunctional,  
22 right?

23 MS. MICHELSON: He testified --

24 THE COURT: Could you answer my question?

10:25:37 25 MS. MICHELSON: Okay.



1 THE COURT: Isn't that the issue in the case?

2 MS. MICHELSON: Yeah, it's one of them, yes.

3 THE COURT: Okay.

4 MS. MICHELSON: On functionality, yes.

10:25:46 5 THE COURT: Of the Lubecore pump -- excuse me,  
6 of the Groeneveld pump, not Lubecore?

7 MS. MICHELSON: Right.

8 THE COURT: So is it -- how is it relevant  
9 then? What are -- what is he going to testify about the  
10:25:56 10 Lubecore?

11 MS. MICHELSON: Mr. Vermeulen gave lots of  
12 testimony and says that he's the one who designed both  
13 systems, created both systems independently, including that  
14 he created the Lubecore independent of the Groeneveld, and  
10:26:10 15 Dr. Rashidi says that is not possible. That is --

16 THE COURT: Okay.

17 MS. MICHELSON: -- discredits his testimony.

18 THE COURT: All right.

19 MR. ANASTOS: May I speak, your Honor?

10:26:21 20 THE COURT: Yeah.

21 MR. ANASTOS: First of all, one of the key  
22 points is expert like. Secondly, Mr. Vermeulen testified  
23 100 percent from his personal experience in terms of the  
24 development of the pumps. If there was cross-examination  
10:26:35 25 with respect to that issue, it should have been done during

1 cross-examination of Mr. Vermeulen. Thirdly, if they're  
2 going to put on evidence of functionality at this point,  
3 that should have been done in their case-in-chief. It's not  
4 a rebuttal issue. It's an issue on which they had the  
10:26:48 5 burden of proof to begin with.

6 THE COURT: No, I -- right. Is he going to  
7 testify about the functionality of the Groeneveld pump?

8 MS. MICHELSON: No.

9 THE COURT: Okay.

10:26:59 10 MS. MICHELSON: His testimony is that --  
11 well --

12 MR. ANASTOS: Going to discredit  
13 Mr. Vermeulen's testimony.

14 THE COURT: Understand.

10:27:09 15 MS. MICHELSON: Your Honor, whether, whether  
16 this is an intentional copy or not, whether it's a copy at  
17 all, I mean they have said -- Lubecore has said that it is  
18 not a copy, not a copy. It's not identical, not even an  
19 intentional copy.

10:27:24 20 THE COURT: Your witness -- I actually wrote  
21 it down. Mr. Wapenaar said, "I do not need to have 20/20  
22 vision to see that there are differences."

23 MS. MICHELSON: For him because he, after he  
24 studied it, he could see it.

10:27:38 25 THE COURT: He looked at it on the table.

1 That's what he was saying he looked at it on the table.

2 That's your guy.

3 MS. MICHELSON: Your Honor, also when he first  
4 saw it and didn't know what was going on, he had a very  
10:27:46 5 different reaction. Now, the Court a year or a year and a  
6 half later, he can see --

7 THE COURT: The objection is sustained.

8 MS. MICHELSON: Well, I will -- I will just  
9 proffer --

10:27:57 10 THE COURT: Okay.

11 MS. MICHELSON: -- his --

12 THE COURT: All right. Now, you have any  
13 other motions?

14 MR. ANASTOS: I don't know if -- are there any  
10:28:06 15 more witnesses?

16 THE COURT: You rested. So let's hear what  
17 you have to say.

18 MR. ANASTOS: Yeah. I'd like to move my  
19 exhibits first or --

10:28:11 20 THE COURT: You can do that, but you guys can  
21 do that on your own. I'd like to listen to --

22 MR. ANASTOS: I absolutely renew the motion  
23 for judgment, as a matter of law, upon the completion of the  
24 whole case. Now, you may take into consideration, your  
10:28:22 25 Honor, all the testimony that you've heard in this case,

1 Mr. Vermeulen's and Mr. Eissis', especially, in reaching a  
2 determination that there's not enough evidence to go to the  
3 jury on functionality, let alone any of the other issues.

4 Mr. Vermeulen testified and Mr. Eissis. They've  
10:28:38 5 explained in detail how these pumps came about, what the  
6 engineering principles are that go into their design, and  
7 again, there's no basis that anybody could determine that  
8 engineering necessity did not influence the design of the  
9 Groeneveld pump. And there's also no basis for -- in the  
10:28:56 10 Plaintiff's testimony for any conclusion that the design is  
11 somehow arbitrary or fanciful or in any way not dictated by  
12 engineering necessity.

13 THE COURT: How about the other counts? You  
14 should talk at the podium, Tom, to make sure -- talk from  
10:29:15 15 the podium to make sure that Shirle can get everything.

16 The second count.

17 MR. ANASTOS: The second count I believe is  
18 for unfair competition, also in violation of 15 U.S.C.  
19 1125(a). They would have to prove that the -- that we have  
10:29:55 20 made false designations of origin, false or misleading  
21 descriptions of fact or false or misleading representations  
22 of fact, which is likely to cause confusion or uncertainty  
23 or to cause mistake or to deceive as to either the  
24 affiliation connection or association of --

10:30:13 25 THE COURT: Slow down, slow down.

1 MR. ANASTOS: Of Lubecore with Groeneveld or  
2 as to the origin, sponsorship or approval of Lubecore's  
3 goods, services, or commercial activities by Groeneveld.

4 There's been absolutely -- the same confusion issue  
10:30:28 5 we're talking about with respect to the original trade dress  
6 claim. There's no testimony whatsoever that anybody has  
7 been deceived by anything we have, that Lubecore has done  
8 with respect to the origin of the Lubecore pump. No  
9 testimony that anybody has affiliated the Lubecore pump with  
10:30:45 10 the Groeneveld pump, connected it with the Groeneveld pump,  
11 associated it with the Groeneveld pump, or done anything  
12 false or misleading in terms of unfair competition.

13 In terms of false designation of origin, false or  
14 misleading descriptions of fact, I don't know what we're  
10:31:02 15 going to hear on that. I suppose we're going to hear that  
16 the O-ring in the product description that Mr. Eissis -- the  
17 product comparison sheet that you saw of Mr. Eissis'  
18 testimony compared an O-ring to a quad ring, and Lubecore no  
19 longer uses the quad ring in its pump. It uses an O-ring,  
10:31:21 20 and somehow that's false and misleading.

21 First of all, we have no idea. There was no date on  
22 those things. We don't know when they happened. Second of  
23 all, I don't believe that that's false and misleading and  
24 sufficient to go to a jury.

10:31:35 25 And it wasn't -- the next claim for false advertising,

1 in violation of 15 U.S.C. 1125(a), I'm frankly not sure  
2 there's been any evidence in this case whatsoever of  
3 advertising that Lubecore does. The distribute -- the  
4 brochures that are distributed at trade shows or the sales  
10:31:57 5 material that are handed to prospective customers, I'm not  
6 sure they even qualify as advertising in terms of  
7 advertising to the public. There's been no evidence of  
8 trade journals or anything where we have said anything.  
9 That aside, I don't think there's any -- there was no  
10:32:12 10 evidence in this case of any false or misleading statement.

11 The -- they're going to say that the next generation  
12 of pumps is somehow false and misleading, and it's going to  
13 be false or misleading because there was one greasy pump and  
14 we had to do a recall. That's no basis for saying that a  
10:32:29 15 slogan like next generation of automated lubrication systems  
16 is somehow false or misleading. Mr. Eissis described  
17 in minute detail the reasons he believes that the Lubecore  
18 pump is, in fact, the next generation over all the competing  
19 systems in the market today.

10:32:52 20 We have not made any -- there's no evidence that  
21 Lubecore made any statements to deceive anyone. There's no  
22 statements that it made any statements to -- material  
23 statements that influence the -- a deceived customer's  
24 purchasing decisions. And there is no evidence that if  
10:33:15 25 there were any such statements, that there's some causal

1 link between those statements and any possible harm to  
2 Groeneveld.

3 The next claim is under the deceptive trade practices,  
4 in violation of the Ohio Revised Code. This is primarily  
10:33:37 5 treated the same way as the Lanham Act. And for all the  
6 reasons that we've stated already in terms of no evidence of  
7 confusion, no evidence of any connection being tried to be  
8 asserted between Groeneveld and Lubecore, and everything I  
9 just said, there is insufficient evidence to go to the jury  
10:33:57 10 on that point.

11 The next point for tortious interference with  
12 contractual and business relationships. They have to prove  
13 a contract, that Lubecore knew of the contract, that we  
14 intentionally acted to procure the breach without  
10:34:15 15 justification, and that Groeneveld was injured. There's  
16 been no testimony in this case that we breached any --  
17 caused anyone to breach a contract. The only thing they  
18 could possibly be referring to would be their, Groeneveld's  
19 relationship with Fuel Systems's, Inc., which there's no  
10:34:34 20 distribution agreement. Somehow they're claiming there was  
21 a 25-year oral distribution agreement which in a million  
22 years couldn't be enforceable.

23 Mr. Koppelman, I believe, testified that he didn't  
24 think he had any kind of a contract with Groeneveld. And  
10:34:47 25 furthermore, Mr. Koppelman testified that he severed his

1 relationship with Groeneveld for his own business reasons,  
2 and then started doing what -- doing business with Lubecore  
3 independently.

4 I would also like to say that despite even if by some  
10:35:09 5 chance any of these claims go to the jury on damages,  
6 there's not a scintilla of evidence in the record to support  
7 that any purchaser of a good from Lubecore has done so as a  
8 result of any of the alleged conduct in violation of the  
9 Lanham Act or the Ohio Deception Trade Act or unfair  
10:35:40 10 competition under common law, whatever they have.

11 All they have is Lubecore made some sales, and they  
12 want to say that all of those sales should be attributed to  
13 Groeneveld as Dr. Burke testified, absent any proof that any  
14 of those sales were made as a result of the infringing  
10:36:00 15 activity. Their damages are zero.

16 And I submit that there has been zero evidence that  
17 any sale has been made by Lubecore as a result of anything  
18 that could be described as infringing activity. I go back  
19 and, you know, renew. We could discuss, I suppose, forever  
10:36:23 20 the original trade dress claim. I think your Honor kind of  
21 hit it on the head with respect to what is the trade dress  
22 of the pump, and as you heard in my opening, my belief is  
23 that if there's any protectable trade dress on that thing,  
24 it's the green label and that's all.

10:36:38 25 It's a functional piece of equipment. It does not



1 have any secondary meaning, and there's been absolutely no  
2 zero testimony of any confusion in the marketplace as  
3 between the origin of the Groeneveld pump and the origin of  
4 the Lubecore pump. Thank you.

10:36:57

5 THE COURT: Thank you. Ms. Michelson.

6 MS. MICHELSON: Thanks.

10:37:10

7 MR. MILLER: First, Steve Miller for  
8 Groeneveld for just a few moments. Ms. Michelson is better  
9 equipped to argue the fine points of this, but you've asked  
10 a question to which you've not received a full answer, and  
11 Groeneveld wants you to have the full answer.

10:37:31

12 The question has to do with whether a Rule 50 motion,  
13 giving all reasonable inferences in favor of the Plaintiff,  
14 would be a proper outcome based on the evidence. Here's the  
15 testimony from Willem.

16 THE COURT: From who?

17 MR. MILLER: Willem.

18 MS. MICHELSON: Van der Hulst.

10:37:46

19 MR. MILLER: Can I get the screen? I want to  
20 show it to you. It's very easy to --

21 THE COURT: Took you guys 24 hours to find it.

22 MR. MILLER: It's either in the record or it's  
23 not. Okay.

10:38:10

24 So remember we're dealing with a witness whose first  
25 language is not English.

1 THE COURT: No, no, no, please. Steve,  
2 please.

3 MR. MILLER: No problem, your Honor. Here's  
4 what he testified.

10:38:16 5 "Why did you want to make your pump different looking  
6 than everybody else's that was on the market? Yeah, it's  
7 just a challenge. It's a challenge of designer, and each --  
8 let's say you want to make something different than  
9 everybody else. This is in -- yeah. You want to do that.  
10:38:36 10 This is, I think everybody you want to do something  
11 different than somebody else. So we want to give it a  
12 groove look. So this has to be our pump for many, many  
13 years and it has to be good and nice.

14 "Question: And was the Groeneveld EP-0 pump different  
10:38:53 15 looking than everybody else's on the market?

16 "Answer: At that time, yes. Yes, of course.

17 "Question: Over the last 30 years, did anybody else's  
18 pump look like Groeneveld's, other than what we have here on  
19 the table now?

10:39:11 20 "Answer: No, no.

21 "Question: Did new products come on the market, ALS  
22 pumps, over the last 30 years?

23 "Answer: Yes. There's a lot of product of  
24 lubrication pumps. Your lubrication system, Japanese  
10:39:25 25 Chinese, also Europe, different producers, smaller ones, but

1 they all have their one system -- their own system in a way,  
2 and they all look different, all different."

3 Next.

4 "Question: Did Groeneveld have to make its pump look  
10:39:43 5 this way on the outside because of the way it works on the  
6 inside?

7 "Answer: No, no. Of course not. No, no.

8 "Question: Well, again, you say of course not --

9 "Answer: You can't -- the pump wasn't made in this  
10:39:59 10 way, but you can put the valves inside. You can make out of  
11 the pistons, horizontal or vertical, make it horizontal.  
12 You can change the shape of the reservoir round. You can  
13 make also reservoirs which are square so you can change very  
14 easily the same pump if you thinking the same way.

10:40:23 15 "Further, yet, you can make it different, of course.  
16 You can say, okay, reservoir I make -- you can make all in  
17 plastic. Only inside you can make from aluminum. You can  
18 make the cylinder where the piston is inside steel bushing  
19 that you screw in and you see it. There are -- the pump is  
10:40:43 20 different and in the end" -- and he refers to the Sterk pump  
21 is different, but it do the same, meaning it do the same  
22 thing.

23 Further, "Question: Could you today make this pump  
24 look different and it would still work and function as part  
10:40:59 25 of the ALS?

1 "Answer: Yes, of course.

2 "Question: Well explain how.

3 "Answer: It's not so difficult, so difficult. To  
4 produce it later on, this is another story, but you can  
10:41:13 5 make -- you can imagine everything. As I told, this piston  
6 is a vertical piston. Lincoln United States producer has a  
7 lot of horizontal pieces, and you can make the piston also  
8 horizontal because the grease is not coming in the chamber  
9 by gravity or whatever. When the piston goes back, it gives  
10:41:35 10 the grease in the piston, and you can make it in this way.  
11 So if the reservoir, the piston, poof, it's the same.

12 "Question: Does gravity have an impact on the way  
13 your pump works?

14 "Answer: No, no nothing.

10:41:51 15 "Question: Does the follower plate have to be round  
16 to function in the way that you described?

17 "Answer: No, of course not.

18 "Question: I know you said of course not. Can you  
19 explain to the jury why not?

10:42:06 20 "Answer: Because -- because this is a round  
21 reservoir, automatically the follower has to be round, but  
22 you can make a square follow the square.

23 "Question: And if it's -- if it's an oval shape, is  
24 that a possibility as well or --

10:42:24 25 "Answer: A round, of course, is the most easy shape.

1 This is more natural, but you can make different shapes, of  
2 course.

3 "Question: Is it difficult to produce or more costly  
4 to produce a square reservoir shape?

10:42:38 5 "Answer: To produce, no, because the amount of nylon  
6 in the end makes the price of the reservoir then at the  
7 bottom, the material has to be better than when you make it  
8 round.

9 "Question: If you were making this pump today, would  
10:42:56 10 you make it the same way and use the same materials?

11 "Answer: No, I will not make it the same way,  
12 absolutely not.

13 "Question: So why is it Groeneveld still making the  
14 pump, its own pump, exactly this way if it's harder and more  
10:43:09 15 expensive to do so?

16 "Answer: Because it's our pump. We went to the  
17 market with this pump. Everybody knows this pump. I make  
18 already more than 650,000 of these pumps. Further, and it's  
19 a very nice pump. As long as we sell it, we will keep it  
10:43:30 20 probably. We will keep it probably. Yeah."

21 Next, "Question: Would you have wanted to design and  
22 create and make something that looks like this?" Referring  
23 to Exhibit 42, a different pump?

24 "Answer: No, they'd fire me probably.

10:43:44 25 "Question: And why? If it works, what does anybody

1 care what it looks like?

2 "Answer: You see nowadays, the cars, even trucks,  
3 nowadays, a new truck is nicer than a personal car inside.  
4 The shape on the cars, the wheels, the tire protection, the  
10:44:02 5 tanks, the air tanks, it's unbelievably nice. Not only a  
6 car would go from A to B, no, they want also to make  
7 something nice. So when you put something on a chassis of  
8 an owner of a truck with truck for a lot of money, he bought  
9 all kinds of chrome, insulation, lights, and nice things and  
10:44:23 10 then you put this on the chassis, it's terrible. Huh?"

11 Next, "Question: Referring to Exhibit 44, would you  
12 want Groeneveld's product looking something like this one?

13 "Answer: No.

14 "Question: Why?

10:44:38 15 "Answer: Because we have another philosophy in  
16 lubricating systems."

17 Further, "Answer: We make -- we make art impression  
18 at that time. We make some sketches, how it would look  
19 like. I think we made even another model to show the pump  
10:44:53 20 to the people, to management, because there was money  
21 involved. And we needed to show what we are going to do.  
22 So they had an idea of the shape and the function is only --  
23 yeah, telling how it will function. That's not too easy,  
24 but the shape, we have to show it, yeah.

10:45:11 25 "Question: Does the shape or outline of the pump

1 affect the way the thing performs, the way it delivers  
2 grease throughout the system?

3 "Answer: No.

4 "Question: Explain this to the jury. It might be  
10:45:23 5 obvious, but I'm sorry. I'll ask you to explain.

6 "Answer: It's like a car. No? The car go from A to  
7 B, and they're all different. The shape has nothing to do  
8 with the function of the moving from A to B. And it's the  
9 same as the lubrication system. The only thing we have to  
10:45:40 10 do is create energy and that there is an outlet where grease  
11 is coming out. How you do that? You can do it in many,  
12 many, many ways."

13 Last one. Later, "Answer: The outside look is only  
14 the look." And further, "So we have a lot of possibilities  
10:45:59 15 to make the outside the same and the inside completely  
16 different.

17 "Question: And are there a lot of possibilities to  
18 make the inside the same and the outside completely  
19 different?

10:46:12 20 "Answer: I think I already mentioned that. That's  
21 possible, yes.

22 "Question: And I just -- is it more than just  
23 possible? Is it -- how easy is it or how difficult is it to  
24 do such a thing?

10:46:27 25 "Answer: It's not -- let's say not difficult for

1 someone -- not an expert and not working in this field,  
2 probably it's very difficult, but we have a team. I have a  
3 lot of nice, good, clever designers. And when I say  
4 tomorrow okay, we are going to change this pump in another  
10:46:45 5 shape, we can -- we will make a design and we will find it  
6 out. Yeah."

7 I've only one comment about it. This is the evidence  
8 from which a reasonable jury reasonably could infer that  
9 that design which predated by a long shot the Lubecore  
10:47:05 10 design that mimics, it was fully arbitrary and fanciful in  
11 its silhouette appearance.

12 THE COURT: When you say silhouette, you're  
13 talking about the base, the reservoir, the top, where the  
14 plugs are? You're talking about all that?

10:47:23 15 MR. MILLER: Talking about the outline of the  
16 total shape, and the answer is I believe Groeneveld's  
17 position is that that excludes the label and the color; that  
18 you could take any color you want and put it on the Eiffel  
19 Tower, it's still going to be the Eiffel Tower, take any  
10:47:35 20 label you want.

21 THE COURT: All right.

22 What evidence do you have that it's not -- the  
23 reservoir is not functional?

24 MR. MILLER: Sorry. I didn't hear the first.

10:47:43 25 THE COURT: What evidence is there that the



1 reservoir is nonfunctional?

2 MR. MILLER: I didn't say the reservoir is  
3 nonfunctional.

10:47:51

4 THE COURT: I am asking you. That's the test,  
5 isn't it?

6 MR. MILLER: No, I don't believe that is the  
7 test. I think the question is, is the totality of the trade  
8 dress not nonfunctional or functional, and I believe --

10:48:01

9 THE COURT: Okay. And that one sentence where  
10 he says that we just designed it this way and, ergo, it's  
11 nonfunctional, that's what you say is the evidence?

10:48:18

12 MR. MILLER: No, not one sentence. It's all  
13 these sentences, and all these sentences -- no. And all  
14 these sentences taken together -- remember the Court's job  
15 isn't to weigh which witnesses but --

16 THE COURT: You didn't have to tell me what my  
17 job is.

10:48:29

18 MR. MILLER: Fair enough. All these sentences  
19 taken together are a reasonable jury reasonably could  
20 conclude either of two things. A reasonable jury could  
21 conclude you know what; I think that cylinder is functional.  
22 I think it grows organically out of the base.

10:48:47

23 THE COURT: No, that's being silly, Steve.  
24 It's not -- they designed it in this way. That's why I  
25 kept -- we kept going through this during the whole course

1 of the trial. This was designed in a specific way. And  
2 that's why I asked Ms. Michelson several times what exactly  
3 is your claim the trade dress is.

4 Now, I think we have an idea. It's the appearance.  
10:49:01 5 Well, when it goes out into the marketplace, the appearance  
6 includes the labels and the coloring. That's part of it.  
7 You can't -- if that's what your trade dress is, just the  
8 outward appearance of it. So you can't exclude the color  
9 and the -- and the label if that's what your trade dress  
10:49:20 10 claim is because it doesn't go out in the marketplace  
11 without it. There's no evidence of it anyway.

12 MR. MILLER: Okay.

13 First of all, I don't intend to be silly at all, and I  
14 certainly don't mean to come through that way. Second of  
10:49:29 15 all, I believe that when I get in the courtroom, I heard Ms.  
16 Michelson answer by saying that the trade dress is the  
17 outward appearance of the silhouette and shape of the item.

18 THE COURT: Okay. Fair enough. I got it.

19 MR. MILLER: Thank you.

10:49:46 20 THE COURT: You want to argue the other ones  
21 or no?

22 MS. MICHELSON: Okay.

23 Your Honor, on the unfair competition claims, there  
24 indeed has been testimony and evidence from which --  
10:50:16 25 actually on all of them -- a reasonable jury could conclude

1 and find in favor of Groeneveld.

2 On the Lanham Act, unfair competition claims, you  
3 know, the issue -- the issue, the statute basically says any  
4 word, term, make, symbol or device or combination thereof  
10:50:38 5 that is likely to cause confusion, and the statute itself is  
6 not limited to confusion of end user consumers, and  
7 legislative history and the case law makes clear that it is  
8 not limited to point of sale confusion on the part of end  
9 user customers. And I believe that's what Defense counsel's  
10:51:04 10 argument is on the likelihood of confusion. And that is not  
11 the test at all.

12 It is not limited that way by the statute, by the  
13 legislative history or by any other case law. And in this  
14 case, there is substantial evidence of a likelihood of  
10:51:19 15 confusion. There indeed is evidence of actual confusion.  
16 There is evidence.

17 Dean Osborn, a guy who buys these things in Wisconsin,  
18 basically said that when he sees the Groeneveld -- when he  
19 saw the Lubecore, he thought -- he immediately thought oh,  
10:51:39 20 it's a Groeneveld with a Lubecore label. He recognized the  
21 shape like that on sight. He immediately associated the  
22 Lubecore pump with the Groeneveld, notwithstanding the  
23 label. He bought it because he thought oh, because the  
24 outside of the thing looks the same, then the inside must  
10:51:57 25 work just as well. Product -- quality confusion is as

1 actionable under the Lanham Act as the -- as any other kind  
2 of confusion. The statute does not limit it in the way the  
3 Defense counsel urges here, and there's ample authority that  
4 supports it.

10:52:15 5 So there is evidence of actual confusion, and there's  
6 more. There's -- there is -- the law says that people in  
7 the industry, besides end user customers who are confused  
8 upon seeing the two, who are uncertain upon seeing the two,  
9 who find the two confusingly similar and, therefore, have to  
10:52:42 10 go embark on some sort of investigation to figure out what  
11 the heck is happening in the marketplace, that counts. That  
12 is actual confusion. And not only is it actual confusion of  
13 them, it's evidence of the likelihood of confusion that  
14 others in the marketplace, including an end user of the  
10:53:00 15 product, will also experience the same kind of confusion.

16 Intentional copying is one element and, your Honor, I  
17 am not going to pretend that the label isn't one factor that  
18 a jury can consider. The point is it's not the only factor,  
19 and it is not dispositive of the issue here, especially when  
10:53:21 20 witness after witness after witness, including defense  
21 witnesses, that they see the Lubecore and think of a  
22 Groeneveld, and that the label, especially in this industry,  
23 means so little.

24 Bill Koppelman, Defense witness, said that the label  
10:53:40 25 is the last thing that he and, therefore, people in his

1 place, in his industry, would look at to identify a pump.  
2 And the fact that -- you know, we have pumps with all  
3 different kinds of names on them and you cannot tell by  
4 looking at that label where it was made, who made it, who  
10:53:59 5 created it, where it came from, what the relationship is.  
6 So the label doesn't do it. It's not the be all and the end  
7 all.

8 We have evidence of actual confusion, and we have  
9 compelling evidence of intentional copying, notwithstanding  
10:54:18 10 their dispute of it. There is compelling evidence that that  
11 thing would not look exactly like Groeneveld's thing unless  
12 there was a concerted intentional effort to make it so.

13 THE COURT: I mean if it's nonfunctional,  
14 that's okay, isn't it? Or if it's functional, it's okay?

10:54:40 15 MS. MICHELSON: Copying a functional --  
16 copying the inside -- okay. I won't say it's okay. I will  
17 say we don't have a claim for it. We're not claiming that  
18 that is unlawful. Okay. I agree with you.

19 THE COURT: I mean you're making it sound like  
10:54:56 20 if it's -- the jury finds that it's functional, then there's  
21 a problem.

22 MS. MICHELSON: No.

23 Well, I don't mean to articulate it that way because  
24 as I did say before --

10:55:05 25 THE COURT: Just let me only ask you one last

1 question.

2 MS. MICHELSON: -- different parts of evidence  
3 applies to different pieces in different ways.

4 THE COURT: With you on that.

10:55:12 5 On the damages issue, what evidence -- is there any  
6 evidence here that anybody bought the Lubecore pump in lieu  
7 of a Groeneveld pump?

8 MS. MICHELSON: Well, I will -- I will say  
9 one, it's not legally required for us to get damages in the  
10:55:28 10 way they've structured our jury instructions and in our  
11 briefing, but two, yes, Dean Osborn said he bought it  
12 because he thought, looking at it, that it was the same  
13 thing, except somebody else was selling it, that it was a  
14 Groeneveld product with a Lubecore label being peddled by  
10:55:51 15 Groeneveld people, made by Groeneveld people, same  
16 technology, same source and origin.

17 THE COURT: Okay. Whoa. Take a breath.

18 That means if there is damages, you could be awarded  
19 damages for that purchase. But, how about the other? How  
10:56:04 20 do you then extrapolate out that anybody who want a Lubecore  
21 pump, if they didn't buy the Lubecore pump, they would have  
22 bought a Groeneveld pump?

23 MS. MICHELSON: I understand your question,  
24 and I'm going to answer it in this way.

10:56:15 25 It is not the law that we must prove a connection

1 between each sale to a customer who is confused. The law  
2 is -- does not require that we prove -- we prove  
3 infringement or unfair competition, we prove liability, and  
4 we are entitled to recover the actual damages, Groeneveld's  
10:56:50 5 actual damages from sales of the infringing product or the  
6 unfair product, however you want to describe it; the  
7 competing product, disgorgement of Lubecore's profits,  
8 and/or corrective costs. They -- the statute -- the law  
9 doesn't require us to establish the link in the way that the  
10:57:11 10 Defendant is urging here. And I do have some law, and I can  
11 find it if you want --

12 THE COURT: You don't need to. You don't need  
13 to.

14 MS. MICHELSON: I believe we did brief the  
10:57:21 15 issue, and I am prepared to find it if you'd like those  
16 citations.

17 THE COURT: You don't need to.

18 You want to respond, Tom, and then we're ready to go.  
19 I'm ready to go.

10:57:32 20 MR. ANASTOS: I listened to all the testimony  
21 read by Mr. Miller from Mr. Vermeulen's -- Mr. Hulst's  
22 testimony, and Mr. Miller's summation was that this is the  
23 evidence of nonfunctionality. None of that was any evidence  
24 of nonfunctionality. It was that they wanted to make  
10:58:08 25 something different. Different is not the definition of

1 nonfunctionality. That you could make other pumps that  
2 would function the same way and look different is not the  
3 issue of nonfunctional versus functional.

4 All of this is entirely irrelevant to the question of  
10:58:25 5 whether or not the pump that they made is nonfunctional.  
6 They have to prove that the pump that -- the look of that  
7 pump is nonfunctional, not that you could do it other ways  
8 at all. And different does not mean nonfunctional. Nice  
9 looking does not mean nonfunctional. Nonfunctional means it  
10:58:47 10 was arbitrary in the design. There's no engineering basis  
11 for how it looks.

12 And actually, I want to bring you back to one last  
13 point, your Honor.

14 Mr. Van der Hulst was testifying about which pump,  
10:58:59 15 which one of these was the one that they tried to make look  
16 nice. Mr. Van der Hulst was talking to a pump -- about a  
17 pump that they designed in the early 80's. We know from  
18 Mr. Eissis' testimony that the testimony that we're talking  
19 about here didn't even come on the market until the 90's.

10:59:14 20 So Mr. Van der Hulst's testimony that they were trying  
21 to make something look distinctive would mean the one you  
22 look at right there on the end with the black cap on it is  
23 the distinctive looking one that they put all this effort  
24 into to look nice.

10:59:26 25 Now, if that one is nonfunctional, then almost by



1 definition in their scheme of things, the next one is  
2 nonfunctional in its design, and the next one is  
3 nonfunctional in its design. So that means every pump,  
4 every automated -- every single stroke, EP-0 piston-driven  
10:59:43 5 pump on the planet is nonfunctional according to Groeneveld  
6 because they've captured all of these.

7 They -- according to them, they could see somebody  
8 who's using -- whose pump looks like Mr. Eissis' based on  
9 the first one they made there because it's a distinctive  
10:59:59 10 design, which Mr. Van der Hulst said hasn't changed in any  
11 major respect since the early 1980s. Well, look at them.  
12 It's changed in significant respects since the early 1980s.

13 I listened to Mr. Osborn testify. I don't remember  
14 Mr. Osborn testifying in any way, shape, or form that he  
11:00:20 15 purchased the Lubecore pump because he thought it would be a  
16 good pump based on its look. He was 100 percent aware of  
17 who he was purchasing it from. He was 100 percent aware of  
18 what product he was purchasing. He testified that he likes  
19 both pumps. He likes the people he's dealing with, he might  
11:00:38 20 consider to keep buying both of them. It was absolutely  
21 zero testimony that he was confused or that he relied on the  
22 look of the Groeneveld -- the Lubecore pump in making the  
23 purchase, relied on it in terms of having dictated that it  
24 must be a reliable piece of equipment because it looks like  
11:00:56 25 a Groeneveld pump.

1           Of course, Mr. Koppelman can recognize the look of the  
2           Groeneveld pump without having to look at the label. The  
3           man has sold thousands of them. He was -- he's Fuel Systems  
4           Industries. They were a Groeneveld distributor for how many  
5           years? Why wouldn't he be able to? That's not the issue  
6           here. It's whether the more common Joe, the more common  
7           truck purchaser would look at that silhouette and say that's  
8           a Groeneveld, and there's no testimony about that at all in  
9           this case.

10           I disagree, and I can bring the law out in terms of  
11           what they would need to prove in order to make a causal link  
12           between any infringing activity and damages. They have  
13           failed to do so whatsoever. It's not a general assumption  
14           that if there's any form of infringement, that the party is  
15           entitled to willy-nilly damages. They still have to prove  
16           to a degree of certainty that there's a causal link between  
17           the alleged -- or even if it's found infringing activity in  
18           the lost sales.

19           THE COURT: Okay.

20           I've listened to everything, believe me. I looked at  
21           everything. There's insufficient evidence to go forward  
22           with Counts 2 through 6. The motion is granted. As to  
23           Count 1, I'm going to reserve ruling and let you go ahead  
24           and argue. So I'll give you a 15-minute break, get your  
25           charge up here, and we're ready to go.

1 MR. ANASTOS: Thank you, your Honor.

2 THE COURT: And you have to get your exhibits  
3 together. I don't think you have.

4 MR. ANASTOS: I think we're ready to --

11:02:27 5 MS. ZUJKOWSKI: I can tell her the rest of the  
6 list now.

7 THE COURT: Do it and I have another thing to  
8 do and let Shirle take a break.

9 (Thereupon, a recess was taken.)

11:16:05 10 MS. ZUJKOWSKI: Your Honor, the Defense moves  
11 to include in the record Exhibits -- Defendant's Exhibit A,  
12 DX-A, DX-B, DX-E, DX-K, DX-L, DX-X, DX-Y, DX-AA, DX-BB,  
13 DX-CC, DX-DD, and DX-EE.

14 I did just communicate this list to Mr. Kunselman  
11:16:44 15 before the break so I'm not aware yet whether or not there  
16 are objections. I'll let them speak to them.

17 THE COURT: Okay.

18 MS. MICHELSON: I'm just looking at this --  
19 what's DX-E?

11:16:58 20 MS. ZUJKOWSKI: E.

21 MR. KUNSELMAN: Exemplar.

22 MS. ZUJKOWSKI: With Greco -- we'll withdraw  
23 that.

24 MS. MICHELSON: Okay. And I just have to look  
11:17:19 25 and see which is A and I know is this the A? Just so --

1 that's A and that's B. Okay. No objection to A or B. K,  
2 no objection. L, no objection. And what else you have, X?

3 MS. ZUJKOWSKI: Yes.

4 MS. MICHELSON: I object to X. I object to --  
11:18:06 5 hold on one second. I have to think. I object to Y. I  
6 object to Z, I object to AA. I have to see which one is BB.

7 MR. ANASTOS: The smaller Lubecore.

8 MS. MICHELSON: Oh. No objection to BB. I  
9 object to CC, I object to DD, and to EE.

11:19:22 10 MS. ZUJKOWSKI: Your Honor, would you like me  
11 to respond to the objections?

12 THE COURT: No.

13 I don't know what -- I don't have -- I don't think I  
14 have it. I have X, the exhibit X, tell me what Y is.

11:19:44 15 MS. ZUJKOWSKI: Y is the one -- the first one  
16 these earlier pumps.

17 THE COURT: All right. Z is what?

18 MS. ZUJKOWSKI: Z is the trademark  
19 registration from Belgium Netherlands that Ms. Coker  
11:20:00 20 indicated.

21 THE COURT: AA?

22 MS. ZUJKOWSKI: AA is this pump. So.

23 THE COURT: Got it. That's all right. I'm  
24 with you. CC.

11:20:09 25 MR. ANASTOS: The family grouping pictures of

1 pumps.

2 THE COURT: DD?

3 MS. ZUJKOWSKI: The fact comparison sheet with  
4 different -- between.

11:20:20 5 THE COURT: Let me see that. And this is  
6 what?

7 MR. ANASTOS: Mr. Eissis testified to them.  
8 The fact comparison sheets used in sales between Lubecore  
9 and various other brands of pumps.

11:20:51 10 THE COURT: EE.

11 MS. ZUJKOWSKI: That's just the O-ring that  
12 Mr. Eissis testified that they suit out in of the recall  
13 warranty issue.

14 THE COURT: Okay. The objection to X, Y, Z,  
11:21:05 15 AA, CC, DD, are overruled. All the other exhibits then will  
16 be received.

17 You want me to give the instructions first or you want  
18 to argue first?

19 MS. ZUJKOWSKI: I think we prefer the  
11:21:14 20 instructions.

21 MS. MICHELSON: Yes, your Honor we do need to  
22 also make our proffer for Mr. Rashidi's testimony that we  
23 would have --

24 THE COURT: We can do that when we're on a  
11:21:26 25 break.

1 MS. MICHELSON: Okay. Okay, Chris, I guess we  
2 can get the jury.

3 THE CLERK: Okay.

4 MR. MILLER: Your Honor, so far I see two  
11:21:44 5 things in the instructions.

6 THE COURT: That's all right. You can object  
7 after I do it.

8 MR. KUNSELMAN:

9 MR. MILLER: No may I say one thing.  
11:21:50 10 One of them will be a source of objection because I  
11 don't think it will change your mind. One of them may be a  
12 typo.

13 THE COURT: Yeah, I can --

14 MR. MILLER: Wan.

11:21:58 15 THE COURT: Do it quick.

16 MR. MILLER:

17 THE COURT: This is why I'm doing you a favor  
18 you can argue the law.

19 MR. MILLER: Page 9, four lines up from the  
11:22:10 20 bottom, supposed to be -- is it supposed to be singular  
21 issue or multiple plural issue with an S on the end.

22 THE COURT: Oh, geez. As I read it, I --  
23 sometimes I edit it a little bit.

24 MR. MILLER: Okay.

11:22:48 25 (Proceedings resumed in the presence of the jury:)

1 THE COURT: We are in session again. You may  
2 have to sit back and relax a little bit because we're going  
3 to go straight until we're finished if that's all right with  
4 everybody rather than break for lunch have you come back and  
5 go over it. But, each side has rested their case. That  
6 means you've heard all the testimony that you're going to  
7 hear during the course of the trial.

8 The next order of business will be the -- I'll give  
9 you some of the instructions every law so you can understand  
10 what the law that applies in the case. Then each side gets  
11 a chance to argue their case. The Plaintiff goes first  
12 because the Plaintiff has the burden of proof. The  
13 Defendant is then given an opportunity to argue its case,  
14 then the Plaintiff concludes or makes the final argument,  
15 and then I will give you some concluding instructions about  
16 your conduct in the jury room and other kind of procedural  
17 matters like that. What I'm going to do is ask you to --  
18 yeah, to take all the instructions together, I may sit down  
19 as we do this I may keep standing, I don't know, but because  
20 this has to be recorded as well, that's why I moved over and  
21 done it like this.

22 But, let me say this as we go through the process.  
23 Take each instruction together and make sure that you follow  
24 the instructions I give you and I'll tell you that about ten  
25 times during the course of these instructions. But, I will

1 tell you this, that I read the instructions out of an  
2 abundance of caution to ensure or make sure that I don't  
3 misstate the law to you. And they're all of equal  
4 importance.

11:24:49 5 CHARGE OF THE COURT

6 THE COURT: Ladies and gentlemen of the jury,  
7 we now come to the part of the trial where the Court gives  
8 the jury the law in the case, and before I start or as I  
9 start, I want to tell you something about the charge to the  
11:24:58 10 jury.

11 As I told you several times, the jury, you are the  
12 triers of the fact and the Court makes all the  
13 determinations of law. So to help you understand this  
14 charge and simplify it, I've divided it into basically three  
11:25:13 15 parts. The first portion of the charge deals with the  
16 general law that applies in almost every civil case. It  
17 defines what evidence is, the burden of proof, credibility  
18 of witnesses, and the function of the Court and the jury in  
19 other matters like that.

11:25:33 20 The second area discusses the law that applies to the  
21 specific claim or claims in this case. So I will review  
22 with you the law that applies in this case and the various  
23 elements of that law. I will also define for you terms that  
24 require definition. Some of the terms are common and  
11:25:51 25 generally understood and, therefore, do not require any



1 additional definition or explanation by me. I will then  
2 instruct you on your duties in regard to your findings and  
3 your verdict. After I tell you the law applicable in the  
4 case, I will give you instructions about your deliberations.  
11:26:10 5 This will include any questions or considerations I may  
6 submit for your consideration and the verdict forms that I  
7 give you for your final determination.

8 Now, you have heard the evidence in the case and you  
9 are about to hear the arguments of the lawyers. It is now  
11:26:26 10 the duty of the Court to instruct you on the law which  
11 applies in this case. Remember again, that the Court and  
12 the jury have separate functions. You decide the disputed  
13 facts and the Court provides you the instructions of law.  
14 It is your sworn duty to accept these instructions and to  
11:26:42 15 apply the law as it is given to you by me. Therefore, you  
16 are not permitted to change the law nor to apply your own  
17 conception to what you think the law ought to be, given the  
18 facts in this case. So in keeping with your oath, you will  
19 not be swayed or influenced by considerations extraneous to  
11:27:02 20 the law and the evidence, such as sympathy, bias, or  
21 prejudice for or against any party to this lawsuit while it  
22 is your duty to follow and apply to this case the law as the  
23 Court now gives it to you. You and you alone are the judges  
24 of the facts. And in this respect, you are to exercise your  
11:27:20 25 own judgment without regard to anything which the Court may

1 have said or done during the course of the trial.

2 You know, during the course of this trial the Court  
3 has been requested to rule upon objections made by  
4 Plaintiffs and Defendant's counsel. These objections, as I  
11:27:39 5 told you at the beginning, raise legal questions, and the  
6 Court in deciding them has endeavored to follow the law. So  
7 you will draw no inference of any kind from the manner in  
8 which the Court has ruled upon any question of law, nor will  
9 you because of any expression or other act of the Court  
11:27:53 10 infer that the Court entertains any motion whatsoever as to  
11 the facts in this case. The Court must not, and then,  
12 therefore, does not, seek to invade the province of the jury  
13 in determining the issues which you are called upon to  
14 decide. And as far as you're concerned, the Court has no  
11:28:10 15 opinion whatsoever on the matters which it is your  
16 responsibility to decide. I'm going to give you an overview  
17 statement of what I think the law is, but again, you have to  
18 rely on what the evidence is.

19 The Plaintiff here, Groeneveld Transport Efficiency,  
11:28:26 20 Inc., Groeneveld, asserts that the design features and  
21 overall appearance of Defendant, Lubecore International,  
22 Inc.'s, Lubecore's automated truck lubrication system is so  
23 similar to the design features and overall appearance of  
24 Groeneveld's EP-0 pump as to confuse buyers and harm  
11:28:46 25 Groeneveld. As such, Groeneveld asserts that Lubecore

1 committed infringement of the trade dress of Groeneveld's  
2 product in violation of the Lanham Act. That's 15, United  
3 States Code, Section 1125(a).

4 This is not a patent case as neither Groeneveld's pump  
11:29:04 5 itself nor any of its components parts are protected by a  
6 patent. Thus, there is no prohibition against copying the  
7 functional design of Groeneveld's pump; rather, Groeneveld  
8 will only be entitled to relief if you find that Groeneveld  
9 is entitled to trade dress protection under the Lanham Act.

11:29:23 10 In this case, Groeneveld asserts that the trade dress  
11 of its EP-0 pump is the external shape and appearance of the  
12 pump, which would include all aspects of its external  
13 appearance, including its logo and color. I will describe  
14 the elements of Plaintiff's trade dress claim later in these  
11:29:42 15 instructions. The Defendant Lubecore denies the Plaintiff's  
16 claim.

17 At the commencement of this trial, counsel for the  
18 Plaintiff and counsel for the Defense each addressed you in  
19 what we have referred to as opening statements. And in  
11:29:56 20 those opening statements, they sought to outline for you  
21 what they expected the evidence to show as the trial  
22 progressed. Now, when we conclude here or when I conclude  
23 with these instructions, there'll be a closing arguments,  
24 and I'll have some comments about closing arguments right  
11:30:11 25 immediately before they give them. But, remember this

1 again. Opening statements and closing arguments are proper  
2 in an effort to assist the jury, but you are instructed that  
3 they do not constitute evidence in this case. And,  
4 therefore, will not be so considered by you, nor are you --  
5 will you consider as evidence any testimony or any other  
6 information which the Court has either withdrawn from your  
7 consideration or has instructed you to disregard.

8 So whenever reference is made to evidence by which  
9 this case is to be decided, the jury will understand that  
10 the evidence includes all of the testimony that you heard  
11 from the mouths of the several witnesses who appeared and  
12 testified here during the trial, either by in person or by  
13 written or oral deposition, any exhibits that have been  
14 offered and received into evidence, and you'll have with you  
15 when you retire in your deliberation and any stipulations,  
16 which you heard the stipulations were read during the course  
17 of this trial.

18 Now, evidence may be either direct or circumstantial  
19 or both. Direct evidence is a recital of facts by witnesses  
20 who have actual knowledge as to what transpired. It's the  
21 testimony given by a witness who has actually seen or heard  
22 the things concerning which that witness has testified.

23 Now, circumstantial evidence, on the other hand, is  
24 the proof of facts or circumstances from which the jury may  
25 infer other connected facts or related facts which naturally

1 and logically follow according to the common experience of  
2 mankind.

3 And remember, you are permitted to make any logical  
4 and immediate inference from the facts which you have found  
5 to be established here in the evidence. Now, there's always  
6 confusion, almost always confusion, by jurors or some jurors  
7 as to the circumstantial evidence or the weight of it.

8 First of all, no type of evidence, either direct or  
9 circumstantial, is any better or any worse than any other.

10 And it's up to you to decide what you believe and what you  
11 don't believe. But, the best example I can think of, first  
12 of all, direct evidence you know we talked about that in the  
13 jury selection process. You actually see something or you  
14 hear something, and you testify about that. That's pretty  
15 simple. And the other thing is circumstantial evidence.

16 Now, an example of that would be this. You're all watching  
17 me right now. And if you saw me and I took my index finger  
18 and put it there, you all saw that, right? So you could  
19 come here and testify at a later date that you saw me put my  
20 right index finger on that piece of wood. That would be  
21 direct evidence that I touched that piece of wood. Fair  
22 enough? If the fact finder believed you, then that would be  
23 sufficient to prove that I did that.

24 On the other hand, if there's nobody here, go back to  
25 that example. And I did the exact same thing, put my finger

1 on that, then how would you -- how would a person prove that  
2 I put my index finger on that piece of wood? Well, as you  
3 probably know, there are such things as fingerprints, right?  
4 And if you were told by an expert that there are no two  
5 fingerprints alike in the world, and every individual -- my  
6 right index finger are unique, that they could come in here,  
7 and then they would dust this, and it's a dark piece of wood  
8 use white powder -- you've seen that on TV -- and the  
9 technician would dust it with a white powder and take a  
10 piece of latex and tape and put it on -- on it, and it  
11 lifts. That's called a latent fingerprint lift. And you  
12 could look at it and you could see the ridges of my right  
13 index finger, but it would take more testimony by the  
14 technician to say okay, I run it, I counted the ridges,  
15 whatever they do, to determine and identify an identifiable  
16 print. They would compare it with all the known prints in  
17 the world and come up with me. Then the technician could  
18 come in here and say yeah -- yep, Don Nugent's right index  
19 finger was found right here on that piece of wood.

20 Now, if you believed that technician, then that would  
21 be sufficient for you to find that at some time, I put my  
22 right index finger on that piece of wood. Sound fair? Now,  
23 that's drawing an inference right from circumstantial  
24 evidence. The latent print and the officer's testimony was  
25 all direct evidence, but the inference you draw that I put

1 my right index finger comes from all the direct evidence  
2 that you heard. Fair enough?

3 Now, when we say you can't draw one inference on  
4 another inference, you can say I can draw the inference that  
11:34:30 5 the Judge put his right index finger on that piece of wood,  
6 but you couldn't draw the inference of when I did it, right?  
7 Because nobody saw it. Nobody testified about it. So you  
8 can't draw one inference from another. So that's what we  
9 call circumstantial evidence.

11:34:43 10 Sometimes -- now this is more appropriate I think in a  
11 criminal case, but sometimes circumstantial evidence is a  
12 lot better than direct evidence because the fingerprint  
13 doesn't lie and somebody may be mistaken. Don't worry. It  
14 won't fall. Just the higher we are, the more they sway.  
11:35:01 15 And if you start seeing me go like that, that's when you  
16 have to worry.

17 (Laughter.)

18 THE COURT: So an inference is a reasonable  
19 deduction of fact which logically follows from other facts  
11:35:12 20 established by the evidence which you may but are not  
21 required to make. And here's what we talk about. However,  
22 you may not build one inference upon another inference, but  
23 you may make more than one inference from the same set of  
24 facts or circumstances. Those are issues or decisions for  
11:35:27 25 you to make.

1           So having considered all the evidence, you must then  
2           determine whether the parties have met their respective  
3           obligations to prove their claims. Generally, the party  
4           asserting a proposition to be true has the burden of proof  
11:35:42 5           as to that proposition. The burden of proof means the duty  
6           of producing evidence to lead you to believe that the facts  
7           are as that claimant contends. So when a particular party  
8           has the burden of proof on a particular issue, that party  
9           must prove facts material to that issue by a preponderance  
11:36:02 10          of the evidence.

11           The burden of proof then rests upon the Plaintiff in  
12           this case to prove by a preponderance of the evidence the  
13           essential and material allegations of their complaint which  
14           are denied by the Defendant.

11:36:17 15           These affirmative allegations denied by the Defendant  
16           constitute the issues of fact which the Plaintiff has the  
17           burden to prove by a preponderance of the evidence. The  
18           Defendant bears the burden of proving any affirmative  
19           offense, but I don't think there are any in this case.

11:36:34 20           Preponderance of the evidence, what is that?  
21           Preponderance of the evidence is the greater weight of the  
22           evidence; that is, evidence that you believe because it  
23           outweighs or overbalances in your minds the evidence that's  
24           opposed to it. A preponderance means evidence that is more  
11:36:49 25           probable, more persuasive, or of a greater probative value.



1 Remember it is the quality of the evidence that must be  
2 weighed. Quality is not necessarily identical to quantity  
3 or the greater number of witnesses produced. In determining  
4 whether an issue has been proved by evidence, you should  
11:37:12 5 consider all the evidence regardless of who produced it.

6 Now, if the weight of the evidence is equally balanced  
7 or if you are unable to determine which side of an issue has  
8 the preponderance, the party who has the burden of proof  
9 then has not established that issue by a preponderance of  
11:37:27 10 the evidence.

11 I know evidence in lawsuits is not always clear and  
12 unquestionable. I do not expect you to decide the issues on  
13 certainties. Injustice could easily result if you awarded  
14 the verdict to a party who is only possibly entitled to it.  
11:37:45 15 You cannot be satisfied with mere possibilities. Your  
16 answers to the issues must be based on probability; what is  
17 probably the truth, what is more likely the truth than not.  
18 And another way of expressing this or your function is that  
19 you are to decide the issues according to the preponderance  
11:38:02 20 of all the evidence, regardless of who produced it.

21 So if you find the Plaintiff has proved its claim by a  
22 preponderance of the evidence, in that event, your verdict  
23 would be for the Plaintiff. On the other hand, if you find  
24 the Plaintiff has failed to prove any one or more of the  
11:38:17 25 elements of the Plaintiff's claim by a preponderance of the

1 evidence, your verdict would then be for the Defendant.

2 Now, as the sole judges of the facts, you are also the  
3 sole judges of the credibility of the witnesses and the  
4 weight to be given to every person's testimony. Now, to  
11:38:34 5 weigh the evidence, you must consider the credibility or the  
6 believability of each person who testified. To do this, you  
7 apply the test of truthfulness that you all apply in your  
8 own daily lives. And in determining the credibility of any  
9 witness, you should consider the interest or bias the  
11:38:51 10 witness may have in the outcome of the verdict, if any, the  
11 witness' appearance, manner and demeanor while testifying  
12 here before you, the witness' candor and frankness or lack  
13 of candor or frankness, the consistency of that witness'  
14 testimony with all the other known facts in the case, the  
11:39:10 15 witness' accuracy of memory, the witness' intelligence or  
16 lack of it, the reasonableness or unreasonableness of the  
17 witness' testimony, in light of all the other facts and  
18 circumstances presented in the case, and the probability  
19 that the witness knows the truth of the facts and  
11:39:27 20 circumstances established by the evidence, which, in your  
21 judgment, would either add or detract from that witness'  
22 credibility, and weigh their testimony, and which will  
23 enable you to determine what degree of credibility you  
24 assign to the testimony of any witness.

11:39:44 25 Now, you are instructed that one way of impeaching a

1 witness is by showing that the witness has made different  
2 and contradictory statements on the same point on a former  
3 occasion. If you find from the evidence that any witness  
4 has been impeached in this manner, you may take that into  
11:40:00 5 consideration in determining that person's credibility and  
6 the weight you give to that person's testimony.

7 You are instructed that you are not bound to believe  
8 something to be a fact simply because a witness has stated  
9 it to be a fact. If you believe from all the evidence that  
11:40:14 10 such witness is either mistaken or has testified falsely  
11 concerning any such alleged fact, you may believe or  
12 disbelieve any witness as you see fit. You are not then  
13 required to believe what a witness has testified to, merely  
14 because the witness -- or the statement was made on the  
11:40:30 15 witness stand and/or under oath. You may believe all or  
16 part or none of what any witness has said in accordance with  
17 the credit to which you feel it is entitled in the exercise  
18 of your honest and impartial judgment. As a matter of law,  
19 then you may believe a portion of the testimony of any  
11:40:48 20 witness and disregard the rest of that person's testimony or  
21 you may disbelieve all the testimony of a particular witness  
22 or you may believe all the testimony of a particular  
23 witness. Those are evaluation and judgments for the jury to  
24 make.

11:41:00 25 Now, I told you this before, too, but some testimony

1 here was presented by video. This evidence is to be  
2 considered according to the same tests that apply to all  
3 other witnesses. Now, if statements in a deposition differ  
4 from the testimony given by the same witness in the  
11:41:15 5 courtroom, you may consider them to test the believability  
6 of such witness. And again, along this line, sometimes when  
7 I talk about impeachment and about giving a different  
8 statement on former occasion on the same issue, stuff like  
9 that, you can use those impeachment techniques to determine  
11:41:31 10 whether you believe a person's testimony or not, but whether  
11 you do that, do you it like you do in your own life, make a  
12 decision whether the mistake or the difference was about  
13 some important fact or some unimportant detail or was the  
14 result of intentional -- intentionally trying to mislead you  
11:41:48 15 or not. It is a mistake or accident. Those things are  
16 possible when things like that happen. You understand the  
17 context of what goes on in the trial of a lawsuit.

18 The Rules of Evidence ordinarily do not permit  
19 witnesses to testify about their opinions or conclusions.  
11:42:04 20 An exception to this rule exists for expert witnesses. An  
21 expert witness is a person who, by their education and  
22 experience, has become an expert in some art, science,  
23 profession, or calling. Expert witnesses may state their  
24 opinions as to matters in which they profess to be an expert  
11:42:22 25 and may also state their reasons for their opinions. You

1 should consider each expert opinion received in this case in  
2 evidence and give it such weight as you think it deserves.  
3 If you should decide that the opinion of an expert witness  
4 is not based upon sufficient education and experience or if  
11:42:40 5 you should conclude that the reasons given in support of the  
6 opinion are not sound, or if you feel that it is outweighed  
7 by other evidence, you may disregard the opinion of an  
8 expert entirely. Just because a person is a witness does  
9 not entitle them to be given more or less weight than any  
11:42:55 10 other witness who appears before you. You judge their  
11 testimony of any witness.

12 You must also not draw any inference for or against  
13 any party from questions which the Court did not permit to  
14 be answered. The Court alone as I've told you rules upon  
11:43:12 15 the admission of evidence. Since you do not know the answer  
16 to such questions, to guess what the answers might have been  
17 would be improper. And you are not permitted to consider  
18 for any purpose questions which the Court did not allow to  
19 be answered, nor to consider any suggestions in questions of  
11:43:27 20 counsel by reasons of such repetition. You may consider  
21 only such evidence as the Court has admitted and give it  
22 such weight and credibility as you think is appropriate.

23 Now, there were some demonstrative evidence. You'll  
24 have some to go back with you. I'm not sure some of the  
11:43:44 25 things on the writing board go back or not. I don't think

1 they do. They're used for demonstrative purposes. So don't  
2 worry bring that. So certain models, diagrams, devices and  
3 animations may have been shown to you. Those are used for  
4 convenience to help explain the facts in the case and not  
5 themselves proof of any fact. Certain charts and summaries  
6 may have been received into evidence to illustrate  
7 information brought out in the trial. Charts and summaries  
8 are only as good as the underlying evidence that supports  
9 them. You should, therefore, give them only such weight as  
10 you think the underlying evidence deserves. Again, this is  
11 all logical and make, I think, perfect common sense.

12 Now exhibits. There have been several or a number of  
13 exhibits offered and received into evidence during the  
14 course of the trial. Both by the Plaintiff and the  
15 Defendant.

16 Now, when you go back in the jury room and you're  
17 reviewing these exhibits, they may or may not follow  
18 consecutively. There are a couple reasons for this. One,  
19 the party that marked the exhibit may not have offered it  
20 into evidence; two, for some legal reason or procedural  
21 ruling, the Court may have decided not to admit that piece  
22 of evidence into evidence. And so you don't have it with  
23 you. So just take it -- trust me, you have -- you will have  
24 all the evidence that was properly offered and properly  
25 received into evidence during the course of the trial. And

1 you won't be given any others during the course of your  
2 deliberations.

3 One other comment on that and sometimes jurors ask  
4 this question and say well, will the Court Reporter be able,  
11:45:13 5 permitted to read back any portion of any of the testimony  
6 if we need it? The general answer is no. And the reason  
7 for that is it used to be in the old days, it was too hard  
8 to find that testimony through all the many bits of evidence  
9 that we have during the course of the trial.

11:45:31 10 It's a little easier now with the modern technology  
11 that we have, but it's -- generally the answer is no,  
12 because to -- if you wanted to know the answer like to three  
13 questions put to one witness, that may unduly highlight that  
14 portion of the testimony and may be others in context.

11:45:48 15 That being said, if you come to a point where you say  
16 look, we simply can't make a decision unless we hear certain  
17 testimony or something, if we come to that and you can't  
18 reach a verdict without doing it, then you just address a  
19 question to me, and I'll answer the question. And there is  
11:46:05 20 a good likelihood you might be able to hear maybe all the  
21 testimony, not just that one part of it. Okay?

22 Now, I am now going to instruct you on the law as to  
23 the specific claims in this case. When I say in these  
24 instructions a party had the burden of proof in the  
11:46:24 25 proposition or use the expression if you find or decide, I

1 mean you must be persuaded considering all the evidence that  
2 the proposition is more probably true than not.

3 Now, the claims at issue. Trade dress violations  
4 under the Lanham Act, 15, United States Code, Section  
11:46:42 5 1125(a). Plaintiff claims that Defendant has infringed  
6 Plaintiff's trade dress. Trade dress refers to the  
7 nonfunctional physical detail and design of a product or its  
8 packaging, which identifies the product source and  
9 distinguishes it from the products of others. In this case,  
11:47:06 10 Plaintiff states that its trade dress is the external  
11 appearance and shape of its EP-0 pump, which would include  
12 its logo and color. To recover on a claim of trade dress  
13 infringement, Plaintiff must demonstrate by a preponderance  
14 of the evidence:

11:47:23 15 1. That his trade dress, the external appearance,  
16 shape, logo and color is primarily nonfunctional; and 2.  
17 That the trade dress, the external appearance, shape, logo,  
18 and color in question is distinctive in the marketplace and  
19 has acquired secondary meaning; thereby, indicating the  
11:47:46 20 source of the goods; and 3. That the trade dress of the  
21 competing good is confusingly similar.

22 I will define each of these elements in turn.  
23 Nonfunctional. In order to be protected, a Plaintiff's  
24 trade dress must be nonfunctional. Functional elements  
11:48:07 25 cannot be protected as trade dress. Indeed, where a



1 product, design, or feature is functional, and not otherwise  
2 protected by patent, it is expected and even deemed  
3 beneficial that they be copied. A product feature is  
4 functional and so ineligible for protection if it is  
11:48:31 5 essential to the use or purpose of the item or if it affects  
6 its costs or quality.

7 Trade dress is considered functional if it performs  
8 some function other than identifying the products that the  
9 party produces. The test for determining trade dress  
11:48:52 10 functionality provides that if the particular feature is an  
11 important ingredient in the commercial success of the  
12 product, the interest in free competition permits its  
13 imitation in the absence of a patent or copyright. On the  
14 other hand, where the feature, or more aptly, design, is a  
11:49:15 15 mere arbitrary embellishment to the product, a form of dress  
16 for the goods primarily adopted for purposes of  
17 identification and individual alternate and hence unrelated  
18 to basic consumer demands in connection with the product,  
19 imitation may be forbidden where the requisite showing of  
11:49:33 20 secondary meaning is made. Under such circumstances, since  
21 effective competition may be undertaken without imitation,  
22 the law grants protection. Trade dress may also be  
23 considered functional if it puts a competitor at a  
24 significant nonreputation related disadvantage. The  
11:49:52 25 Defendant here contends that Plaintiff's EP-0 pump is

1 comprised of component parts, all of which serve a purpose  
2 and all of which are located where they are for an  
3 engineering reason. The Defendant contends this is  
4 sufficient to render the component parts and the overall  
11:50:10 5 shape of the pump functional, such that they cannot be  
6 considered protectable trade dress. Plaintiff contends that  
7 the external shape and appearance was assembled as they are  
8 to look nice and to identify the source of the EP-0 pump as  
9 Groeneveld. In order to receive trade dress protection for  
11:50:28 10 the overall combination of functional or seemingly  
11 functional features, those features must be configured in an  
12 arbitrary, fanciful, or distinctive way. Conversely,  
13 engineering necessity, influence is the configuration of the  
14 functional components. The design is functional.

11:50:48 15 The availability of alternate designs does not render  
16 a design nonfunctional. If you agree with the Defendant  
17 that there is nothing arbitrary, fanciful, or distinctive  
18 about Groeneveld's pump other than the Groeneveld logo and  
19 green coloring, and that every component of the pump  
11:51:07 20 performs a function and is part of the pump for a reason,  
21 you must find for the Defendant, and it will not be  
22 necessary to consider the other elements of this claim.  
23 However, if you find that Plaintiff's trade dress, the  
24 external appearance, shape, logo and color, is  
11:51:23 25 nonfunctional, that is arbitrary, fanciful, or distinctive,

1 you should continue to the next element needed to establish  
2 a trade dress claim. Only nongeneric configurations that  
3 have acquired distinctiveness through the attachment of  
4 secondary meaning satisfy the distinctiveness requirement of  
5 the Lanham Act.

6 Secondary meaning occurs when in the minds of  
7 prospective purchasers, the primary significance of the  
8 trade dress, the external appearance, shape, logo, and  
9 colors is to identify the source of the product, rather than  
10 the product itself.

11 You should consider the evidence relating to the  
12 following factors to determine whether the trade dress, the  
13 external appearance, shape, logo, and color of Plaintiff's  
14 EP-0 pump has acquired secondary meaning.

- 15 1. Direct consumer testimony.
- 16 2. Consumer surveys.
- 17 3. Exclusivity, length and manner of use.
- 18 4. Amount and manner of advertising.
- 19 5. Amount of sales and number of customers.
- 20 6. Established place in the market.
- 21 7. And proof of intentional copying.

22 Groeneveld need not put on evidence of all of these  
23 factors and no single factor is determinative. So if you  
24 find that the trade dress, the external appearance, shape,  
25 logo, and color of Plaintiff's EP-0 pump has not acquired

1 secondary meaning, you should then consider whether a  
2 secondary meaning should be inferred as described in the  
3 next instruction.

4 If you find that Plaintiff's trade dress has acquired  
11:53:04 5 secondary meaning, then you must go on to consider whether  
6 the final element of Plaintiff's trade dress claim has been  
7 established.

8 You may consider whether Plaintiff has established a  
9 rebuttable presumption of secondary meaning only if you find  
11:53:18 10 that Groeneveld's trade dress, the external appearance,  
11 shape, logo, and color is nonfunctional as I have previously  
12 instructed. When it is established that a market newcomer  
13 has intentionally copied an existing product's trade dress,  
14 a presumption arises that the intent in such intentional  
11:53:39 15 copying was to benefit from the good will of the  
16 competitor's customers by getting them to believe that the  
17 new product is either the same or originates from the same  
18 source as the product whose trade dress was copied.

19 In essence, if the evidence shows that Lubecore  
11:53:55 20 intentionally copied Plaintiff's trade dress, the external  
21 appearance, shape, logo, and color, it may then be presumed  
22 that Plaintiff's trade dress, the external appearance,  
23 shape, logo, and color is distinctive. However, even a  
24 finding of intentional copying does no more than raise a  
11:54:13 25 rebuttable presumption of secondary meaning.

1 Lubecore may rebut the presumption with evidence of  
2 some logical reason for copying other than to capitalize on  
3 pre-existing reputation. Where there is no evidence that  
4 copying was done with an intent to deceive purchasers, and  
11:54:30 5 thus, derive a benefit from another's name and reputation,  
6 but rather was done to avail the copying party of a design  
7 which is attractive and desirable, there is no presumption  
8 of secondary meaning. Indeed, where elements are  
9 nonfunctional and not otherwise protected by patents, it is  
11:54:47 10 expected and even deemed beneficial that they be copied.

11 So if you find that Groeneveld has proven by a  
12 preponderance of the evidence that Lubecore intentionally  
13 copied Groeneveld's trade dress, the external appearance,  
14 shape, logo, and color, and you find that Lubecore has not  
11:55:04 15 rebutted the presumption with evidence that its copying was  
16 for a reason other than to deceive purchasers, and thus  
17 derive a benefit from another's name and reputation, then  
18 you may draw an inference that Groeneveld's trade dress, the  
19 external appearance shape, logo and color, has secondary  
11:55:22 20 meaning, and thus, is distinctive.

21 So if you find that Groeneveld has not proven by a  
22 preponderance of the evidence that Lubecore intentionally  
23 copied Groeneveld's trade dress or if you find that Lubecore  
24 has provided sufficient rebuttal evidence that its copying  
11:55:39 25 was not to deceive purchasers, and thus, derive a benefit

1 from another's name and reputation, then you will not draw  
2 an inference of secondary meaning based on Lubecore's  
3 intentional copying.

4 Now confusingly similar, even if Plaintiff's trade  
11:55:55 5 dress, the external appearance, shape, logo, and color is  
6 determined to be both nonfunctional and distinctive, it is  
7 acquiring secondary meaning. In order to prevail on a trade  
8 dress infringement claim, Plaintiff must establish the  
9 existence of a likelihood of confusion in the minds of  
11:56:13 10 consumers as to the source or origin of the two parties'  
11 products. Essentially, what the law forbids is one party  
12 passing off its goods as those of another.

13 In determining whether a likelihood of confusion  
14 exists, the following factors should be considered:

11:56:31 15 1. Strength of Plaintiff's trade dress -- again,  
16 external appearance, shape, logo and, color.

17 2. Relatedness of the goods.

18 3. Similarity of the trade dress, the external  
19 appearance, shape, logo, and color.

11:56:47 20 4. Evidence of actual confusion.

21 5. Commonality or similarity of marketing channels  
22 used.

23 6. Likely degree of purchaser care.

24 7. Defendant's intent in selecting the trade dress --  
11:57:03 25 the external appearance, shape, logo, and color.

1 And 8. Likely expansion of the product line.

2 Now, again, no single factor is dispositive. Rather,  
3 the factor serve as a guide to determine whether there is a  
4 likelihood of confusion. So if you find that there is not a  
11:57:20 5 likelihood that a reasonable consumer of automated truck  
6 lubrication system products would be confused as to the  
7 source of Defendant's EP-0 pump, then you must find for the  
8 Defendant.

9 If you find that there is a likelihood of confusion,  
11:57:34 10 and that Plaintiff's trade dress, the external appearance,  
11 shape, logo, and color has acquired secondary meaning, and  
12 is nonfunctional, then you should enter a verdict in favor  
13 of the Plaintiff on its trade dress infringement claim.  
14 Now, I'm now going to -- that covers the instructions of the  
11:57:51 15 legal principles on the claim in the case.

16 I'm now going to instruct you on the issue of damages  
17 that may be awarded if you find that Groeneveld has proved  
18 its claims bay preponderance of the evidence.

19 Now, remember this, too. The fact that I will give  
11:58:04 20 you instructions on the issue of damages does not mean that  
21 I think you should or you should not rule in favor of a  
22 particular party, nor does it mean that you should or should  
23 not award damages. The instructions are given so that if  
24 you do award damages, you will have guidance in how to make  
11:58:20 25 such an award.

1           If you find that Lubecore committed the acts of trade  
2 dress infringement, in violation of federal law, then you  
3 must determine Groeneveld's damages as a result of  
4 Lubecore's conduct as proved by a preponderance of the  
5 evidence.

6           Compensatory damages consists of the amount of money  
7 required to compensate Groeneveld for the injury caused by  
8 Lubecore. In determining compensatory damages, the  
9 difficulty or uncertainty in ascertaining the precise amount  
10 of damages does not preclude recovery. Instead, you should  
11 use your best judgment in determining any amount of such  
12 damages. You may not, however, determine damages by  
13 speculation or conjecture. You must determine the amount of  
14 money that will reasonably and fairly compensate Groeneveld  
15 for any injury you find was caused by Lubecore's conduct.  
16 Groeneveld must prove its compensatory damages by a  
17 preponderance of all the evidence. You should consider  
18 whether any of the following exists; and if so, to what  
19 extent in determining Groeneveld's damages.

20           1. Any injury to Groeneveld's reputation; any injury  
21 to Groeneveld's good will, including any injury to  
22 Groeneveld's general business representation; any loss of  
23 Groeneveld's sales as a result of Lubecore's conduct; and  
24 any loss of Groeneveld's profits, any expense of preventing  
25 customers from being deceived, any cost of future corrective



1 advertising reasonably required to correct any public  
2 confusion caused by Lubecore's conduct; and seven, any other  
3 factors that bear upon Groeneveld's actual damages.

4 The reputation and good will of a company is an  
12:00:01 5 intangible business value that reflects the basic human  
6 tendency to do business with a company that offers products  
7 of the type and quality the consumer desires and expects.  
8 The reputation and good will associated with a particular  
9 product or business may be symbolized by consumers'  
12:00:19 10 acceptance and recognition of trade dress. The good will  
11 attached to a product is often part of overall company -- or  
12 company's overall good will. It is possible, therefore,  
13 that the general good will of a company may be damaged by  
14 the loss of good will for a particular product. Whether  
12:00:36 15 this has occurred in this case is a question of fact that  
16 you have to answer.

17 If you find that Groeneveld's good will has been  
18 damaged either by injury to his general business reputation,  
19 or by injury to the good will of his product, you may award  
12:00:48 20 whatever compensatory damages you find justified by the  
21 evidence presented. The measure of Groeneveld's loss of  
22 good will is the difference between the value of such good  
23 will before and after Lubecore's infringing activities.

24 Now, I'm almost finished. Better for me than you. In  
12:01:14 25 addition to compensatory damages, if you find that Lubecore

1 committed acts of trade dress infringement under federal  
2 law, then Groeneveld is also entitled to any profits earned  
3 by Lubecore that are attributable to Lubecore's infringing  
4 conduct. However, you may not include any award or profit  
12:01:30 5 any amount that you included in determining compensatory  
6 damages. Profits are determined by deducting all expenses  
7 and production costs from the gross revenue associated with  
8 the infringing conduct.

9 Gross revenue is all of Lubecore's receipts from using  
12:01:45 10 the infringing trade dress in the sale of its product.  
11 Expenses are all costs incurred in producing the gross  
12 revenue. Groeneveld has the burden of proving by a  
13 preponderance of the evidence the gross revenues and  
14 Lubecore has the burden of proving by a preponderance of the  
12:02:00 15 evidence the expenses and costs.

16 If the actual sales by Lubecore cannot be precisely  
17 determined, you may resolve any doubts against Lubecore in  
18 calculating profits, particularly, if you find that the  
19 uncertainty is due to Lubecore's inadequate record keeping  
12:02:16 20 or failure to produce documentary evidence to Groeneveld.

21 So now the other thing is if you're -- if you are  
22 considering an award of damages, you cannot consider  
23 attorney fees, court costs, or what we call punitive damages  
24 because they're not applicable. You put that aside. The  
12:02:37 25 only damages you can consider are those I've enumerated here

1 in the instructions.

2 Now, the lawyers have a chance to argue their case to  
3 you. In contrast to opening statements, you heard testimony  
4 and you've seen the evidence. When a lawyer gets up before  
12:02:51 5 you to go over what they think the evidence has shown,  
6 they've heard that, too. As I told you at the beginning,  
7 they've also had a chance to talk to these witnesses on  
8 other occasions and read documents and transcripts and other  
9 things. So if a lawyer says something that you don't  
12:03:07 10 remember from the evidence or that you remember differently,  
11 believe me, I don't think any of these lawyers will ever try  
12 to intentionally mislead you. They may be confused or your  
13 memory may be short on that issue.

14 At the end of the day, though, you have to decide what  
12:03:22 15 you recall the evidence to be, not what a lawyer says or  
16 anybody else tells you. It's your recollection that  
17 controls. Same thing with a lawyer. They're really not  
18 permitted to comment on the things that it is your duty to  
19 decide. That means the credibility of any witness and  
12:03:39 20 whether -- what verdict that you should return. And if a  
21 lawyer makes a comment, improper kind of in the heat of the  
22 battle, disregard that because ultimately you have to decide  
23 what evidence you believe, if any, whether the Plaintiff  
24 proved its claim by a preponderance of the evidence; and if  
12:03:57 25 they did, what amount of damages should be awarded.

1           So sit back, relax, accept the arguments of the  
2           lawyers in the spirit with which it's intended, and when we  
3           come back, when I come back, I'll give you a little bit  
4           about your conduct in your deliberations and in the jury  
12:04:14 5           room. And again, since the Plaintiff has the burden of  
6           proof, they go first, then the Defense has a chance to argue  
7           and then the law requires the Plaintiff to conclude or make  
8           the final argument.

9                       MS. MICHELSON: Your Honor, can we be heard on  
12:04:25 10           the jury instructions?

11                      THE COURT: No. Go ahead.

12                      CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF

13                      MS. MICHELSON: Thank you, your Honor.  
14           Counsel, and ladies and gentlemen of the jury. Thank you,  
12:05:31 15           first of all, so much for paying attention and listening  
16           through our case. It's a so important that we have people  
17           who are willing to perform this function in our system. And  
18           I know that you have paid attention and we appreciate that.

19                      Ladies and gentlemen, you have heard all the testimony  
12:05:57 20           that you've received and the evidence that you've received,  
21           and I told you at the beginning of the case in opening  
22           statements that we would show that Lubecore intentionally  
23           copied the Groeneveld EP-0 ALS automatic lubrication system  
24           and the system, but the case is about the pump in order to  
12:06:29 25           piggy back on the good will of what Lubecore and its

1 founder, Mr. Jan Eissis, knows is a 30-plus year established  
2 reputation in the United States and overseas of a company  
3 that invested significant resources, significant time,  
4 significant effort into creating its own unique and  
12:06:57 5 distinctive product and selling it to the public of people  
6 who use it.

7 They intentionally copied it. He intentionally copied  
8 it and that is an intentional copy of the Groeneveld pump,  
9 in order to -- in order to take advantage of that  
12:07:25 10 reputation, take advantage of industry personnel, immediate  
11 recognition and association of what the Groeneveld thing  
12 looks like with the tried, true, and tested marketplace  
13 player.

14 Defendant, Mr. Eissis, testified that he wanted to  
12:07:53 15 forge his own identity, his own corporate image, and his own  
16 unique place in the market. He says he wants to do so and  
17 made effort, an effort was made, to make his thing look  
18 different than Groeneveld's thing. So that his pump that he  
19 says is better would not be associated with Groeneveld.

12:08:24 20 Ladies and gentlemen, you have your own eyes and you  
21 have your own ears, and you have your common sense. His  
22 thing, triggers in the minds of people who work in this  
23 world and live in this world, an immediate association with  
24 Groeneveld. They all say I look at the Lubecore and I think  
12:08:46 25 it's a Groeneveld, with a Lubecore label. They think it's a

1 Groeneveld with a Lubecore label. The shape, the  
2 silhouette, the outline, the way the thing looks, the way  
3 it's presented, triggers in their mind this association. A  
4 person who is looking to forge his own and establish his own  
12:09:12 5 corporate individual identity in the marketplace is not  
6 going to appropriate virtually every single thing that looks  
7 identical to someone whose product, he says, he's trying to  
8 disassociate himself from.

9 There is -- it is not possible that the Lubecore pump  
12:09:41 10 is anything other than an intentional imitation. Not only  
11 does it look the same, the dimension -- the nominal  
12 dimensions of the component parts inside and out, the  
13 nominal dimensions are the same. The pieces are the same.  
14 Nobody -- I mean use your common -- this is just common  
12:10:06 15 sense. Nobody starts with a piston that looks like the  
16 piston on this easel that Mr. Eissis drew and we had one  
17 when he testified, nobody starts with that and working  
18 backwards comes up with 50-plus component parts as part of a  
19 pump that measure the same and put them together in  
12:10:37 20 practically the same exact way without it being a purposeful  
21 thing. To pretend otherwise is disingenuous. It's not  
22 credible. And to pretend otherwise leads to the conclusion  
23 that the intention was not -- the intention was to piggy  
24 back the reputation of the established market player by the  
12:11:11 25 newcomer on the market.

1           The witnesses all testified that the Groeneveld is  
2     recognizable. The Groeneveld pump is recognizable to them  
3     on sight, they know it when they see it, and when they saw  
4     the Lubecore, they thought it was a Groeneveld with a  
5     Lubecore label. The label is not the thing that makes it  
6     visually dissimilar from the Groeneveld. The thing that  
7     pops out at you, especially when you look at all the other  
8     competing pumps, all of them, none of them look exactly like  
9     the Groeneveld, none of them except the Lubecore. The thing  
10    that pops out at you when you look at them and now that  
11    you've had some experience looking at a few of them, you see  
12    that the thing that pops out at you is its shape, its  
13    silhouette, because that's when people are in the  
14    marketplace and looking at these products, that's the thing  
15    that makes it distinctive and unique. That's the -- that's  
16    the trade dress. And that's what Groeneveld is seeking to  
17    protect, the trade dress that it has used since the pump was  
18    designed 25, 30 years, 30 plus years, and in the market,  
19    here and overseas during that time period.

20           And I did -- I know they brought in last minute ambush  
21    thing with these other two pumps that were --

22                   MR. ANASTOS: Objection.

23                   MS. MICHELSON: Predecessors.

24                   THE COURT: Objection sustained.

25                   MS. MICHELSON: To the pump at issue in this

1 case, but if you -- if you look at the three generations,  
2 the overall visual impression that the three create is the  
3 same, the overall shape is the same. It's been consistent  
4 through the history. The test is not whether you  
12:13:54 5 side-by-side can find differences in pumps and products,  
6 whether if you take a look at something and study it you can  
7 find. So there's an angle here instead of here. It's a --  
8 the test is not the side-by-side comparison.

9 I don't know if any of you read People Magazine.  
12:14:18 10 Sometimes I do when I'm coming back from trips on an  
11 airplane, some kind of mind candy treat I give to myself.  
12 You turn to the back, and they have these pictures of find  
13 the differences. The two pictures are exactly alike and  
14 you're there studying them to find the differences. When  
12:14:33 15 you study them, you can find differences, but the overall  
16 impression that is created is that they are the same.

17 The overall impression that the Lubecore pump gives is  
18 the same impression of this Groeneveld pump. The shapes are  
19 identical. I mean you could layer them over on top of each  
12:15:02 20 other and they would match. In fact, Mr. Willem van der  
21 Hulst testified about how Groeneveld broke down the Lubecore  
22 and measured the parts and fed the data into a computerized  
23 program and showed how they layer on to each other.

24 It is an intentional copy. To pretend otherwise is  
12:15:32 25 not credible and the reasonable logical inference from



1 pretending otherwise is that the intent was not innocent but  
2 rather was to piggy back on somebody else's reputation and  
3 position in the marketplace.

4 The confusion and the uncertainty in the marketplace  
12:16:04 5 that's created, that is actionable here, that we contend  
6 that Groeneveld is actionable here is that when people look  
7 at it, they will think it's the same inside; same quality,  
8 works the same, same recipe, same formula, same drawings, it  
9 emanates from the same source, same origin, maybe the same  
12:16:30 10 factory, maybe the same tooling. The confusion is,  
11 according to Mr. Eissis and Vermeulen, their witnesses, it's  
12 not true because there are differences -- and Mr. Van der  
13 Hulst -- there are differences in tolerances, differences in  
14 materials, there are differences in the way the parts  
12:16:59 15 interact with each other internally. But, when you see it,  
16 you don't know that.

17 Mr. Vermeulen said, he said you can't tell it by  
18 looking at it. That's the confusion. That's the  
19 uncertainty. That's the -- as it is the Defendant's  
12:17:35 20 position that the internal components, notwithstanding what  
21 the 3-D drawings and the break down in internal components,  
22 that they are -- that they are measuring the same and almost  
23 all the same with some slight variation, notwithstanding  
24 that testimony, it's the -- which are meaningful variation  
12:18:02 25 by the way, according to everybody, meaningful in that they

1 do affect the quality and performance of the system,  
2 notwithstanding that, Defendant says it's different on the  
3 inside. Ours is different, different, different. It's  
4 different. But, people in the industry don't know that by  
12:18:17 5 looking at it. They can't tell that by looking at it. And  
6 they look at it and think it's got to work as well as the  
7 Groeneveld because I know the Groeneveld for 30 years or 10  
8 years or 20 years, whatever their particular experience is,  
9 and it's the same.

12:18:39 10 Dean Osborn, he testified by video. He was the guy in  
11 Wisconsin whose, I guess, great-great-granddad started the  
12 company, he testified that he -- when he saw it, when it was  
13 pitched to him, he was comfortable with the product, with  
14 the Lubecore. Why? Because it imitated, it looked exactly  
12:19:03 15 like the Groeneveld to him and he actually said it's a  
16 Groeneveld with a Lubecore pump. He didn't care about the  
17 label. He cared that he recognized the product as a quality  
18 product because it -- he associates it with the Groeneveld.  
19 He was comfortable with it for that reason. He bought it  
12:19:27 20 because of that comfort. He had options to buy something  
21 besides Groeneveld and something besides Lubecore.  
22 You'll recall that his testimony was that, you know, when  
23 Groeneveld lost Fuel Systems as the distributor in  
24 Wisconsin, there was some concern -- there was some concern  
12:19:54 25 as to whether he would be able to get Groeneveld product,

1 based on things that had been told to him. And so Jim  
2 Garvins from FSI came around and pitched him the product,  
3 and he didn't go with any other system. He didn't even  
4 investigate any other system. He talked about how he had --  
12:20:21 5 you know, there was a -- his gas man or oil man has a  
6 Lincoln and been trying to sell them on the Lincoln for a  
7 long time, but no, he wasn't interested in that product. He  
8 wasn't interested in it. He didn't go look for other  
9 options besides the Groeneveld. No. He bought the Lubecore  
12:20:39 10 because he -- it was to him the Groeneveld. It was to him  
11 the Groeneveld.

12 It was a significant factor in his purchasing  
13 decision, the fact that it looked to him identical to the  
14 Groeneveld product.

12:21:08 15 The Judge has instructed you that on likelihood of  
16 confusion, there are a number of factors you can consider in  
17 addition to others that you may deem relevant, and to  
18 consider them and think about them and weigh them and sort  
19 of evaluate where you come out. And I want to address some  
12:21:39 20 of these factors.

21 The strength of the Plaintiff's trade dress, you know,  
22 people -- people know it when they see it. They know the  
23 Groeneveld product when they see it because of the shape and  
24 the overall appearance and design of the thing. They know  
12:21:53 25 it when they see it. And nothing else looks like it,

1 exactly like it. I mean other than the Lubecore.

2 The relatedness of the Defendant's goods and the  
3 Groeneveld goods, there's -- I submit there's really no  
4 issue. That the goods are related. How do you know that?  
12:22:12 5 Because they do the same thing and they're sold in the same  
6 industry. The goods are related. They are both automatic  
7 lubrication systems.

8 The similarity of the trade dress. This in our case,  
9 of course, is hugely an important factor. Hugely relevant.  
12:22:33 10 Nothing else is so similar, nothing even comes close to  
11 imitating the Groeneveld product except for the Lubecore.  
12 The similarity of them is undeniable despite, despite some  
13 attempts to point out little differences.

14 Evidence of actual confusion. Well, there is evidence  
12:23:02 15 of actual confusion. And by the way, sometimes people don't  
16 know they're confused. People think they understand things  
17 perfectly well. They don't know they're confused. So the  
18 fact that 8 billion people aren't running around saying "I'm  
19 so confused" is not the dispositive issue here.

12:23:20 20 There is evidence of actual confusion here and  
21 evidence of some actual confusion is meaningful in that it  
22 shows the likelihood of other people being confused and the  
23 fact that people can run around and investigate and figure  
24 out what's up with the Lubecore, same thing, different  
12:23:44 25 thing, is the technology the same, should we break down --

1 the people fact that people can go ahead and investigate it  
2 and figure it out doesn't eliminate the likelihood of  
3 confusion that's created by the Defendant's infringing  
4 product.

12:23:58 5 Marketing channels. Well, I mean I think the  
6 testimony's undisputed that they market their product the  
7 same way. They both -- both companies use distributors to  
8 distribute the product. They use the same kind of -- go to  
9 the same trade shows, the same end user, all truck drivers,  
12:24:28 10 people who have national fleets, people with smaller fleets,  
11 people who are self-employed, you know, own their own  
12 trucks, owner operators, marketing channels, and the likely  
13 degree of purchaser care, well, you know it's interesting.  
14 Maybe it takes four or five sales visits for someone who's  
12:24:50 15 brand new to the system, but somebody who knows the  
16 Groeneveld and who sees the Lubecore, the testimony of  
17 Mr. Osborn for instance shows it didn't take anywhere near  
18 the kind of effort. Nowhere near the kind of thoughtful  
19 sophisticated, careful analysis of all the systems that  
12:25:22 20 maybe new users might engage in. Mr. Osborn saw that it  
21 looked like the Groeneveld, and guess what? That was all he  
22 needed to really know. He did not investigate further.  
23 This I submit to you is relevant evidence on degree of  
24 purchaser care.

12:25:42 25 Interestingly, and this is common sense too, people --

1 sometimes people who are -- have been involved in the  
2 industry for a long time and are more familiar with the  
3 products that are available out there, will be even less  
4 careful, just like Mr. Osborn was, because they recognize  
12:26:02 5 the product as coming -- as coming from a Groeneveld source,  
6 of Groeneveld design, a Groeneveld manufacturing facility.  
7 They recognize it because they've been involved in the  
8 industry for so long. They don't have to go do rocket  
9 science analysis of it because when they see it, that's all  
12:26:21 10 they need to know. Just like Mr. Osborn. The Defendant's  
11 intent in selecting the trade dress, well we've -- we've  
12 gone through that.

13 And likelihood of expansion of product lines. You  
14 know, there isn't -- there's territory out there. There is  
12:26:51 15 a market out there that's bigger in the United States,  
16 bigger than the current base of users, active users of the  
17 systems. This factor weighs also in favor of a likelihood  
18 of confusion and uncertainty in the marketplace.

19 I would like to talk to you a little bit about  
12:27:21 20 nonfunctionality. You know, look. It's a pump, a pump in  
21 an automatic lubrication system. It's supposed to do  
22 something. It's supposed to deliver grease to greasing  
23 points, and it's supposed to work. That doesn't mean that  
24 the shape of it is essential to the use or purpose of the  
12:27:46 25 product, that it has to be this particular way to carry out

1 its purpose. It -- the shape is not, the appearance is not  
2 essential to the use or purpose, delivery of grease. The  
3 way it's all put together is not essential to the use or  
4 purpose. The silhouette that is created by the way it's put  
5 together is not essential to the use or purpose of the  
6 product. And there was testimony about that, not only from  
7 Mr. Van der Hulst but also from the Defendant himself, who I  
8 will concede, demonstrated quite a bit of knowledge about  
9 these products, products that he said he didn't give  
10 Mr. Martin Vermeulen any instruction on what to do,  
11 whatsoever, except give me a grease output of such and such.

12 Even Mr. Eissis says the shape, the shape is not  
13 essential to the use or purpose. It could be a different  
14 shape and carry out its function.

15 Secondary meaning. Secondary meaning is a -- when  
16 people in the industry see it, do they think Groeneveld?  
17 That's what that means. And guess what? Everybody said  
18 yeah. Everybody said yes. It is unique. It is  
19 distinctive. I know it when I see it. I know it's a  
20 Groeneveld when I see it. When I said what about you see a  
21 Lubecore, you see a Lubecore label on the Lubecore, come on.  
22 And they said I -- that shape, that silhouette that design,  
23 that overall appearance, that triggers in their mind an  
24 immediate association with Groeneveld, and associations like  
25 that can be conscious, but they are not always conscious.

1 Exposure to a particular product over years and years and  
2 years creates a familiarity, a comfort just like Mr. Osborn  
3 testified about that he has, a comfort and familiarity so  
4 that they might not know I'll, I think somebody -- somebody  
12:30:32 5 said they can't pronounce -- oh, Mr. Marcum, they can't  
6 pronounce the name, but they recognize it as something  
7 that's been around for years and years and years. Something  
8 that's tested and tried and true. So what are the factors  
9 on secondary meaning? Direct testimony. Do they know it  
12:30:56 10 when they see it? Yeah, they do. There's customer  
11 testimony about it. Mr. Osborn, Mr. Orville White, gosh it  
12 seems like we've been here a long time. That probably seems  
13 a long time ago to you. He was the gentleman who spoke  
14 really, really quickly, Sentinal Transportation, the  
12:31:16 15 national fleet out there. He's a customer, he buys the  
16 things. He recognizes it on sight. This is relevant  
17 evidence on this inquiry.

18 We don't have a consumer survey because okay, we don't  
19 but that's just one. I expect there will be argument about  
12:31:38 20 that, but that's one factor and I'll grant that to you,  
21 ladies and gentlemen. They didn't run around asking  
22 thousands of customers questions that -- who -- that answers  
23 to which probably would have been challenged anyway;  
24 exclusivity, length, and manner of use. Has Groeneveld used  
12:32:03 25 the design, used its trade dress, exclusively and



1 continuously for the last several decades? The testimony is  
2 undisputed that yes, they have, that that overall shape,  
3 that overall design, that overall way the thing is put  
4 together and presented to the market, they have. We have  
12:32:26 5 evidence about the amount and manner of advertising. By the  
6 way, the fact that -- that the advertising expenses are  
7 incurred by more than just the Brunswick Groeneveld office,  
8 that doesn't matter. Why is that relevant? The fact is  
9 advertising is being done to create that association, money  
12:32:56 10 dollars are being spent on fostering that recognition,  
11 putting the name out there, and putting the image of the  
12 pump out there. And, you know -- it's relevant, and  
13 Groeneveld people have testified consistently how important  
14 the image of the pump is to them. Yeah, their name is  
12:33:27 15 important too, the Groeneveld name, the G, that's important  
16 too. Yeah they incorporate those branding identifiers,  
17 those brand identifiers in their advertising as well. And  
18 doesn't sound like a bad idea. The fact that that's part of  
19 it doesn't mean that the shape and the image of the pump  
12:33:46 20 isn't part of it, too. It is part of it, too, and it is the  
21 shape that has been consistent throughout the overall  
22 presentation of it. Amount of sales and numbers of  
23 customers, well, they're a lot of them. You heard testimony  
24 about it. I mean they're all over the United States. They  
12:34:08 25 are all over Canada. They're all over the world. They -- I

1 can't remember the numbers exactly now, but we're talking  
2 about millions and millions of dollars in Groeneveld these  
3 items for decades, established place in the market. Well, I  
4 mean -- I don't -- I can't -- there's real -- no real  
12:34:29 5 serious dispute that they are one of the players in the  
6 market. There's no real dispute that Lubecore doesn't have  
7 any independent brand recognition of its own. And so,  
8 ladies and gentlemen, it's -- the label doesn't tell the  
9 people that these are two different entities, that the  
12:34:55 10 designs are different, that the sources are different people  
11 see it and they think it's the same.

12 And additional layered on evidence as Mr. Osborn  
13 explained of the same people making them, the same people  
14 selling them, and as Ms. Wolfe explained, the layered-on  
12:35:19 15 advertising similarities, marketing channels, all these  
16 things, you know, cloak it in this appearance, cloak the  
17 Lubecore in the appearance that notwithstanding what someone  
18 says to you, they must be coming from the same design, the  
19 same source, the same recipe.

12:35:44 20 You know, it's -- the -- Coca-Cola, somebody gave you  
21 a bottle of Coca-Cola, the Coca-Cola iconic shape, Coca-Cola  
22 bottle, if it looks like a brown carbonated cola liquid  
23 substance inside there, the guy selling it to you used to  
24 sell you what's called Coke. The people making it made  
12:36:07 25 Coke. The guy who was president of Coke now has this new

1 company, and on his Coca-Cola bottle, he puts the label  
2 Ed's, Ed's Cola, it's -- it's the wink-wink, nod-nod  
3 defense. It's not just for what people say. It's the  
4 impressions that they create that contributes to a  
12:36:30 5 likelihood of confusion.

6 I mean Dean Osborn basically said yeah, that they said  
7 Lubecore was a competitor and they were different, but yeah,  
8 I figured -- I figured the technology came along with  
9 Lubecore because it looks exactly the same as the  
12:36:51 10 Groeneveld.

11 Proof of intentional copying is also relevant on this  
12 secondary meaning factor. And the Judge instructed you on  
13 various presumptions that you can make, draw, and various  
14 inferences you can draw relating to secondary meaning and  
12:37:10 15 uncertainty in the marketplace or likelihood of confusion,  
16 based on the intentional copying.

17 You can reasonably infer secondary meaning, and you  
18 can likewise as to likelihood of confusion, based on if you  
19 find that the copying here was intentional. And I  
12:37:38 20 believe -- not what I believe, and the evidence supports  
21 that finding.

22 Groeneveld carried a Grease Jockey pump -- can I have  
23 87, please? Groeneveld carried this Grease Jockey pump. It  
24 put its Groeneveld label on it. Mr. Vermeulen said you  
12:38:21 25 can't tell anything about a product Groeneveld, whether

1 makes it or where it comes from, from the label. Remember  
2 that testimony. Nevertheless, here's the pump Groeneveld  
3 carried and sold. Grease Jockey TSI. Do you see -- do you  
4 remember all the testimony in this case, people referring to  
5 different pumps by different names, notwithstanding whatever  
6 labels they are on them. Nevertheless -- and this goes to  
7 the likelihood of confusion, by the way, because the label  
8 is there, the explanation for all of this.

9 They carried this, didn't like it. It wasn't good  
10 enough. Everybody said it wasn't good enough. By the way,  
11 this looks nothing like any of the three Groeneveld pumps  
12 you see on the table before you. They decided to make their  
13 own product. They went into a project with another company,  
14 Sempress, they made a couple -- did that for awhile. They  
15 didn't like that either. Mr. Van der Hulst testified that  
16 he and his team developed this generation. The PX-143 and  
17 the six-liter is PX-1 when Mr. Vermeulen wasn't even there.  
18 1981, 1982, by the way, the fact that some of the older  
19 versions might have still been around, so Mr. Eissis had  
20 some to sell in Canada when he joined the company, I guess  
21 six, seven years later. That doesn't mean that the new  
22 generation was not developed and designed by Groeneveld as  
23 Mr. Van der Hulst testified in that case, 1981 and '82. It  
24 was on the market. They start selling it in 1982 and 1983,  
25 and they start selling it in North America in 1985.

1 Mr. Vermeulen says he joined the company in Groeneveld  
2 1984. Well, he wasn't there in 1981 or '82 when the product  
3 that's at issue in this case was designed and developed.  
4 And by the way, he never worked where production took place  
5 in the factory, in Italy. And he testified to that. And  
6 you heard no testimony from him identifying either one of  
7 those two earlier pumps as the things that existed before he  
8 got there.

9 Mr. Van der Hulst's testimony was not challenged on  
10 this issue during cross-examination. He was not shown these  
11 predecessor pumps when he came to testify. Those only came  
12 out when he was back on the plane to Italy.

13 Ladies and gentlemen, I figured this out, the dates,  
14 the dates as Mr. Vermeulen has testified to when he was  
15 employed by Groeneveld. They don't make sense. The  
16 testimony doesn't make sense, and I'm going to show you how.

17 First of all, Groeneveld's employment records, as you  
18 heard Ms. Wilson testify about, show that he worked for the  
19 company November, 1986, to 1995. There's been no challenge  
20 to the validity of these records. That's one. So even --  
21 so if he joins Groeneveld in November of 1986, even by his  
22 own testimony, the new system was already developed before  
23 he even got there. That's one.

24 Two, Mr. Vermeulen's dates are just all wrong. They  
25 just don't add up. He says he was there until 1997.

1 Mr. Vermeulen testified that he was with Groeneveld until  
2 1997 even though the records show him gone in 1995. I have  
3 a transcript of his trial testimony. I'm moving this.

4 "Question: How long have you been affiliated with Tae  
5 Sung?  
12:44:43

6 "Answer: This month, 20 years."

7 This month, he gave the testimony October 4, 2011.  
8 2011 minus 20 years is 1991. He says he was with Groeneveld  
9 in 1991. But, he also says he was with Tae Sung in 1991.  
10 That's one.  
12:45:16

11 He says he was hired and started at Groeneveld in  
12 1984, and that he completed that project pretty quickly  
13 after that. Mr. Eissis testified that the system wasn't  
14 even available, and he didn't start selling it until 1990.  
15 He says he didn't even start selling it until two years  
12:46:05 16 after he, Mr. Eissis, joined Groeneveld. Mr. Eissis says he  
17 joined Groeneveld in, I think, he says 1988. Yeah, so  
18 Mr. Eissis says the old system was the one that was being --  
19 was -- that the new system hadn't come out yet in 1988.

12:46:36 20 But, according to Mr. Vermeulen's testimony, he would have  
21 done that in 1984 and 1985. This is inconsistent. There's  
22 one more.

23 Mr. Vermeulen testified about the generational gap  
24 between his purported design of the Groeneveld pump at issue  
12:47:15 25 in this case, and his purported design and engineering of

1 the Lubecore pump that is at issue in this case. He said  
2 there is a 30-year generational gap. Thirty years. He says  
3 he designed it in 2008. Thirty years from that, 1981. It  
4 doesn't add up.

12:48:02 5 In addition to these dates not adding up, I submit to  
6 you that Mr. Vermeulen's testimony was not worthy of your  
7 belief that he is the designer of the system.

8 He -- it is simply not credible that someone starts  
9 with a measurement, makes a piston and has to create  
12:48:38 10 something around it that ends up looking exactly like the  
11 Groeneveld pump. It's just not credible. It's not credible  
12 that he didn't use reverse engineer pump or use a Groeneveld  
13 pump or a Groeneveld drawing. It's not credible. He didn't  
14 say yeah, we came, we broke down the Groeneveld pump, and we  
12:49:02 15 measured everything and made our own drawings from that and  
16 made it -- he didn't say that. He said absolutely not. He  
17 said he independently designed it from scratch, from a  
18 calculation we did on a piece of paper on a plane ride back  
19 to Korea from Amsterdam, and then a couple months later, he  
12:49:23 20 had to work a prototype, and then the thing is on the market  
21 without even, I guess, doing much testing because he sure  
22 got to market pretty quickly.

23 Well, you don't have to test it if somebody else has  
24 done all the testing for the last 30 plus years. You don't  
12:49:37 25 have to do any testing. Although, maybe they should have

1 because you, as you know, they end you said with some pumps  
2 that didn't work out so well. That leaked, had O-rings that  
3 had quad rings instead of O-rings, nothing that you could  
4 see but things that were meaningful, meaningful differences.

12:50:17 5 You are also going to be asked to evaluate the  
6 credibility of the witness that we put forward to you,  
7 whether you believe them or not, whether you thought they  
8 were telling you the truth, whether you thought they were  
9 playing games with you, whether not only the witnesses we  
12:50:39 10 put forward on this but Defense witnesses as well, who do  
11 you believe. Who played games? Who tried to answer  
12 questions and cross-examination questions in a straight  
13 forward, helpful way? Who wanted to do a dance to confuse  
14 things?

12:50:56 15 MR. ANASTOS: Objection.

16 THE COURT: Overruled.

17 MS. MICHELSON: No dancing is needed if the  
18 truth is on your side.

19 I have to talk about damages and damages numbers. By  
12:51:50 20 the way, ladies and gentlemen, here's the confusion, here's  
21 the confusion. Customers think you can put part  
22 interchangeably together. Exhibit 61-2.

23 MR. KUNSELMAN: Can we get the Elmo on,  
24 please? Thank you.

12:52:16 25 MS. MICHELSON: If parts aren't



1 interchangeable, if they aren't used as well when put  
2 together, then people are confused, customers are confused  
3 if they think otherwise and if they act otherwise. People  
4 are confused when a warranty program says if you use our  
12:52:36 5 grease, then we'll -- you got your warrant, your extended  
6 warranty. If you're using the Lubecore, if you're using the  
7 Groeneveld -- and by the way, if your Groeneveld pump has  
8 any problem because you're using our Lubecore grease, we'll  
9 come out and our people will fix it, our people will put our  
12:52:55 10 parts in if any needs to be replaced or repaired. Our  
11 people will warrant the Groeneveld product. Our product,  
12 the next generation, the next generation in ALS, we warrant  
13 that product.

14 So was there some actual confusion that we proved  
12:53:32 15 where somebody thought it was the same thing or just as good  
16 or the technology was the same when they bought it because  
17 that's what they thought, they were comfortable with it?  
18 Yes, there is evidence in the case before you, and you can  
19 reasonably conclude from all of what you've heard and all  
12:53:49 20 that you see, and using your own common sense, which the  
21 Judge has charged you is infinitely appropriate for you to  
22 do in this case.

23 But, there is a likelihood of confusion and  
24 uncertainty in the marketplace. Always all he's got to do  
12:54:04 25 is change the way the thing looks on the outside. That's

1 it. That's it. That's it. Why wouldn't he do it if he  
2 doesn't want it to look different? He says he wants it to  
3 look different. He says he wants it to be distinguished  
4 from the Groeneveld. Well, we heard of so many witnesses  
12:54:25 5 saying that they don't distinguish it from the Groeneveld.  
6 They think they're the same thing. If he really wanted it,  
7 people could think otherwise, why wouldn't he just change  
8 something about the shape of it, the silhouette, something?  
9 And it's not because he doesn't have to. Because he also  
12:54:41 10 said that he could. He also -- he, Mr. Eissis, said well  
11 yes, the shape can be different, notwithstanding the  
12 internal working, mechanical components of the system.

13 Now, the Judge charged you on damages. He told you  
14 about who's got to show what and who's got to peel things  
12:55:10 15 away and those sorts of things, and that you can consider  
16 when you decide which calculations to accept -- can I see --  
17 can I see that? I don't want to misstate that. Can I see  
18 that chart?

19 Here's what we got, ladies and gentlemen. When the  
12:55:30 20 question -- when the request for information was made a long  
21 time ago, more than a year ago, we got a chart, a summary,  
22 these are Lubecore's numbers, these are Mr. Eissis' numbers  
23 showing gross revenues in 2010, gross revenues projected in  
24 2011. It was almost year end in 2010. So any projections  
12:55:58 25 in 2010 should have been reasonably accurate. This is what

1 we got. And we didn't get anything on 2009, by the way,  
2 nothing except some testimony from Mr. Eissis that he sold  
3 200 of the systems in the United States in 2009.

4 And by the way, you know, I heard something along the  
12:56:25 5 lines that oh, there was just a projection or that it was --  
6 you're not projecting at the end of 2010 what you did in the  
7 past in 2009. That's just nonsense. His testimony under  
8 oath was 200 pumps, 200 systems were sold in the United  
9 States in 2009, and no contrary information was provided  
12:56:54 10 until two days before trial, in a document, Defendant's  
11 Exhibit X, please.

12 MR. KUNSELMAN: It's here.

13 MS. MICHELSON: No, Defendant's Exhibit X.  
14 Has no backup supporting documents. It's not any reference  
12:57:22 15 to any -- Mr. Eissis didn't prepare it himself. There's no  
16 testimony that he verified personally the accuracy of any of  
17 the information in here. I submit to you, ladies and  
18 gentlemen, based on what you heard, and what you saw in this  
19 courtroom, it is reasonable and appropriate and compelling  
12:57:59 20 to use these numbers that he presented and it was  
21 appropriate when Groeneveld gave you its damages  
22 calculations for Groeneveld to rely on what he said, what he  
23 said under oath. You know, he swore to the accuracy of this  
24 under oath when he testified about it during his deposition  
12:58:22 25 a year ago. Which one is it? Which testimony is true?

1 Which one isn't true? Which -- which one maximizes the  
2 numbers when there's an interest in maximizing them, and  
3 then two days before trial, minimizes or tries to minimize  
4 them when there's an interest in minimizing them?

12:58:46 5 Is this credible? Are these, Defendant's Exhibit X,  
6 can you rely on these as real numbers? Why should you and  
7 why would you? Why would anybody? And so -- by the way,  
8 the damages aren't what profit is left when you take all  
9 kinds of expenses out that have no proper place in a damages  
12:59:29 10 calculation for the kind of claim that we have here.

11 The Judge very specifically told you in his jury  
12 instruction what Defendant's expenses are, the appropriate  
13 expenses to offset against gross revenues. You -- you --  
14 you can't tell from looking at this what the appropriate  
12:59:53 15 expenses are. And you can tell from looking at this that a  
16 number of -- this, meaning Defendant's Exhibit X -- that a  
17 number of them that he tries to patent there and include in  
18 there are not within the Court's definition of what an  
19 appropriate deduction or offset or expense is.

13:00:11 20 And by the way, the Judge also told you that it's  
21 their burden to show what those offsets are. To give you  
22 competent credible evidence, reliable evidence, so that --  
23 to offset it, and if they don't, you are entitled to -- and  
24 if they don't, Groeneveld is entitled to an award of the  
13:00:48 25 gross revenues and as Lubecore's profits because

1 Groeneveld's entitled to the compensatory -- its own actual  
2 damages, including its lost sales damages, which we'll go  
3 through that in a second. It's entitled to Defendant's  
4 profits on sales of the infringing product, and it's  
13:01:16 5 entitled to damages for corrective -- corrective expenses  
6 that Groeneveld had to incur to sort of try and -- try and  
7 correct the misperceptions and the confusion going on in the  
8 marketplace. And you'll recall testimony from Ms. Wilson on  
9 that point that she estimated between 18 to \$20,000. And so  
13:01:36 10 Groeneveld does request that you include that in your  
11 damages award.

12 So Ms. Wilson, Gail Wilson, the CFO of Groeneveld, who  
13 you -- I'm sure when you do your job of deliberating will  
14 consider her demeanor on the stand, the way she carried  
13:02:22 15 herself, her attempt to answer questions the best way that  
16 she could, her forthcomingness when you evaluate whether you  
17 believe what she told you. And by the way, there's no  
18 evidence that she has any personal financial interest in the  
19 outcome of this case, unlike the Defendant.

13:02:47 20 She relied on Lubecore's number when she made her  
21 calculations. First, the 2009 sales of 200 units, 200 ALS  
22 sales that Mr. Eissis testified he made in the marketplace.  
23 And an average selling price of 1500 per unit when it goes  
24 through distributors, more by the way when they go to end  
13:03:15 25 users, but we're not asking for that. We're not even asking

1 to go that far. We're not asking for every single dime.  
2 This is a conservative estimate based on information that  
3 they provided; 200 products times 1500, \$300,000 with the  
4 margin of 41.3 percent, \$123,900. I want you to write these  
13:03:45 5 down, and I'm going to add them up. She went through with  
6 how she calculated her contribution margin, the steps she  
7 took, the care that she took. The conservative approach  
8 that she took. The records she relied on, her personal  
9 knowledge of Groeneveld's records, her personal involvement  
13:04:14 10 with creating and maintaining them. That's \$123,900. Based  
11 on Defendant's reported gross sales of its infringing  
12 product in the United States in 2010, \$1,042,088.01 that  
13 Lubecore reported were its gross sales, projected would be  
14 its gross sales and never until the 11th hour when trial's  
13:04:55 15 going to start, try to say something differently. Their  
16 reported gross sales, she -- she took out sales that  
17 wouldn't have gone through the Brunswick office. She took  
18 that out. We took that out and came up with a gross sales  
19 figure in this amount, multiplied it, came out with \$367,000  
13:05:25 20 in 2010, went through the same -- better write that one  
21 down -- went through the same process on the 2011 reported  
22 numbers by Lubecore and came up with \$734,727.

23 I submit to you, ladies and gentlemen, that your  
24 damage award to Groeneveld for amounts incurred to date or  
13:05:56 25 through 2011, based on Lubecore's reported sales figures to

1 which they have not adequately demonstrated or credibly  
2 demonstrated, they are entitled to any setoffs or deductions  
3 or offsets whatsoever, is -- oh, I think I did it --  
4 \$1,225,627.

13:06:32 5 There was additional testimony from Dr. Burke as to  
6 his regression analysis of going forward, damages caused by  
7 the infringement. Based on his experience and statistical  
8 analysis, his reliance on Groeneveld's financial data, all  
9 of which he had access to. And Lubecore's reported figures  
13:07:02 10 and his going forward, and there was testimony from Ms.

11 Wilson of a five-year -- a five-year time period for the  
12 market to adjust itself, meaning for the damage caused by  
13 the infringing product to sort of settle down, five years  
14 his five-year figure of total -- his five-year figure of  
13:07:41 15 Groeneveld's lost sales damages is this number.

16 MR. ANASTOS: Is this an Exhibit, your Honor?

17 MS. MICHELSON: I thought this was in. And  
18 we're -- look, he did calculations all the way out for ten  
19 years. Groeneveld isn't even asking you to go that far.  
13:08:02 20 They're conservatively asking you for \$2,806,326 to correct  
21 the marketplace for the five years.

22 I did -- plus the 18 to \$20,000, and I'll leave it to  
23 you to decide whether you want to do 18 or 20, for the  
24 corrective action that Ms. Wilson talked about. And there's  
13:08:37 25 one more piece of it as we explained on Lubecore's profits,

1 the law allows for disgorgement of profits if you find that  
2 there is infringement.

3 Lubecore's profits are its gross sales minus what  
4 Lubecore demonstrates are appropriate credible and reliable  
13:08:56 5 offsets. Lubecore has not demonstrated any such thing, that  
6 there are any. So the numbers we ask you to return on that  
7 item are their reported figures, their gross revenues in  
8 2010, 2011, and the numbers are here. And you can take them  
9 with you when you go into the jury room.

13:09:45 10 So, ladies and gentlemen, I do thank you for your  
11 patience. I probably talked a long time. I'm doing my  
12 best. Here the issue is simple for you. It really is. Is  
13 it an intentional copy? Is it nonfunctional? Is the trade  
14 dress that Groeneveld is claiming, does the shape of the  
13:10:13 15 thing make it work? Is it essential to the use or purpose  
16 of the product? Is the shape of it the thing that makes it  
17 work? The silhouette of it, the overall appearance, the  
18 testimony before you is it's not.

19 Is there secondary meaning? Do people look at it and  
13:10:34 20 go wow, it looks like a -- it's a Groeneveld, I recognize it  
21 on sight because it's a Groeneveld? I do recognize it on  
22 sight as a Groeneveld, notwithstanding the label there, the  
23 label not being there, whether it's dirty, whether it's  
24 clean, whether it's on a truck. The evidence before you is  
13:10:49 25 yes, they do. And is there evidence that there's a



1       likelihood, a likelihood, we don't have to prove actual  
2       confusion to prevail, is there a likelihood of confusion or  
3       uncertainty in the marketplace caused by Defendant's  
4       intentional imitation of the Groeneveld trade dress and?  
13:11:14 5       The evidence before you is there is.

6               So we will ask you to return a verdict in favor of  
7       Groeneveld on its trade dress infringement claim and award  
8       damages to Groeneveld in the amounts I have identified, that  
9       these calculations appear on the exhibits you will take with  
13:11:37 10       you. And I thank you once again sincerely.

11               THE COURT: Thank you. All right, folks. I  
12       will let you go to lunch. So keep in mind the admonitions.  
13       It's really important now that you've heard a lot of stuff,  
14       you haven't heard it all. 2:15 we'll meet downstairs. Will  
13:11:52 15       that be good, Chris?

16               DEPUTY CLERK: Um-hum.

17               THE COURT: Can't see if Mr. Yarger's awake.  
18       If he is, tell him 2:15.

19               (Thereupon, a luncheon recess was had.)

14:22:50 20

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1                   Thursday Session, October 20, 2011, at 2:15 P.M.

2                   THE COURT:   Okay, Mr. Anastos.   You may  
3                   proceed.

4                   CLOSING ARGUMENTS ON BEHALF OF THE DEFENSE

14:23:16 5                   MR. ANASTOS:   Good afternoon, ladies and  
6                   gentlemen.   When I started my opening statement last  
7                   Thursday, when we all first met for the first time, I asked  
8                   you to look at the two pumps at issue in this case and ask  
9                   yourself without raising your hand or otherwise indicating  
14:23:29 10                  if you can tell the difference between the Groeneveld pump  
11                  and the Lubecore pump.   I'm going to ask you that again  
12                  without any -- don't raise your hands.   Don't indicate.  
13                  But, can you tell the difference between the Groeneveld pump  
14                  and the Lubecore pump?   And I'm sure the answer is yes, and  
14:23:43 15                  we all can, because it's distinguished.

16                  There's been -- Ms. Michelson's argument, she says  
17                  what jumps out at people about these pumps is the shape.  
18                  And ask yourself when you look at the Lubecore pump, what  
19                  jumps out at you as identifying it's a Lubecore pump is the  
14:23:59 20                  shape or the Lubecore red label, the Lubecore trademark on  
21                  it in red, the red follower plate, and the Lubecore logo  
22                  down lower on the identification plate?   Is it the shape or  
23                  is it all the red stuff and the Lubecore name that you use  
24                  to identify it as the Lubecore pump?

14:24:18 25                  You've been instructed that the Plaintiff needs to

1 prove three things in order to win their case. And the  
2 first item on the list is what's called nonfunctionality.  
3 They have to prove that there's something nonfunctional  
4 about the design of their pump, something that is an  
14:24:41 5 arbitrary embellishment to this, something that's  
6 ornamental, something that's there for some reason other  
7 than engineering reasons, other than engineering influences.

8 The first thing I think I want you to ask yourself is  
9 which pump was Mr. Van der Hulst talking about when he  
14:25:05 10 testified that a new pump came into existence by Groeneveld  
11 in -- I don't know. I think he said the early 1980s, they  
12 moved from the one they were using and selling to Grease  
13 Jockey. I think it should be pretty transparent by now that  
14 it was not the pump that we're talking about in this case.  
14:25:26 15 The pump we're talking about in this case was not introduced  
16 to the market until the 1990s, and the reason we know that  
17 is that Mr. Eissis, who nobody disagrees first became a  
18 Groeneveld distributor in 1988, was not selling the pump  
19 that was at issue in this case. He was selling the second  
14:25:44 20 pump in the lineup there, the one with the all plastic lid  
21 and the screw downs for the screw ins's for holding down the  
22 reservoir.

23 Ms. Michelson said in her -- in her closing that we  
24 really don't have to believe Mr. Eissis -- no. We can  
14:26:06 25 believe Mr. Eissis that he was selling the pump there in

1 1988, but that doesn't prove that the pump that is at issue  
2 in this case really didn't exist in 1988. It somehow  
3 existed in '81 or '82, but Mr. Eissis was selling the  
4 earlier version in 1988. Now, does that make any sense to  
14:26:27 5 you? That would be like walking onto a Ford dealer lot  
6 today and when the 2011 models are out, and that Ford dealer  
7 selling 2004 models because they were left over and Ford  
8 wants to sell them, selling them as new on his lot. That  
9 makes absolutely no sense. When the new models come out,  
14:26:46 10 every manufacturer wants that new model to be sold. So the  
11 current model when Mr. Eissis was selling them in 1988 was  
12 Pump Number 2 and the new pump was not made until -- or  
13 wasn't released to the public until the 1990s. These things  
14 are grease pumps. Mr. Vermeulen and Mr. Van der Hulst both  
14:27:11 15 testified unequivocally that it would cost more to  
16 manufacture these in a different way. And that only makes  
17 sense from a manufacturer perspective.

18 You -- someone who is selling a Groeneveld pump wants  
19 to acquire it, have it made, have its cost of goods be as  
14:27:32 20 low as possible, the testimony here from Mr. Van der Hulst  
21 and Mr. Vermeulen is that the basis of these pumps optimize  
22 the amount of aluminum necessary to enclose the working  
23 parts and to make room to have the valves and other things  
24 screwed into it. No more material is used than needs to be  
14:27:57 25 used and no less material is used than needs to be used. If

1 you use less, you risk the thing blowing up because of the  
2 air pressure inside. If you use more, it costs more.

3 If someone wants to make something ornamental, they  
4 put more into it. They make it cost more because they want  
14:28:12 5 it to be nice and people to buy it because it looks nice.  
6 We all know these things could have been made to look nicer.  
7 The base could have been rounded off with aluminum, but if  
8 you added another round of aluminum on the whole outside of  
9 the diameter of that base, consider it, how much would it  
14:28:29 10 have added to the cost of the item and would that have put  
11 the seller at a disadvantage because they would have had to  
12 pay more to acquire their product and would not have been  
13 making as much profit in the end?

14 With respect to Mr. Van der Hulst's testimony, look at  
14:28:52 15 the first three pumps in line. You have to ask yourself  
16 which pump was he talking about when he testified that he  
17 wanted, or Groeneveld wanted to make a pump that looked  
18 distinctive. Now, if it's the first pump in line there,  
19 which I think the time line demonstrates was the pump that  
14:29:08 20 Mr. Vermeulen was talking about, then that's their  
21 distinctive pump. Is it distinctive? Looks like a grease  
22 pump like all the grease pumps we have seen in this case so  
23 far. Is it the second pump? Is that the one that's  
24 supposed to look distinctive? Which one of those was  
14:29:30 25 Mr. Van der Hulst talking about when he said that he was

1 ordered -- they drew designs and wanted to make something  
2 that looked nice? It has to be that first pump. So that's  
3 the one they wanted to make look nice, then Mr. Van der  
4 Hulst's testimony is utterly irrelevant to this case. The  
14:29:46 5 testimony for Mr. Vermeulen and actually from Mr. Van der  
6 Hulst was that all of these things are made out of  
7 functional pieces that are put together to make a functional  
8 unit. The base is larger than it has to be. The size of  
9 the base is driven by the internal components, and the other  
14:30:05 10 things that need to be attached to it, the check valves, the  
11 pressure valves, the input of the hydraulic from below,  
12 all -- the main line going out.

13 The base is made so that it can accommodate a grease  
14 pump and accommodate the air pressure that drives the grease  
14:30:21 15 pump and accommodate all of the things that are needed to  
16 work that pump and test the air pressure. Where does the  
17 reservoir come from? We talked about that in detail with  
18 Mr. Van der Hulst. You start with a certain -- you start  
19 with a certain circumference to the -- to the -- excuse me.  
14:30:42 20 Certain area to the base of the reservoir. How is that area  
21 determined? It's determined by the size of the base. You  
22 don't want the reservoir to be bigger than the size of the  
23 base because then you'd have to expand the base with more  
24 material which would cost more. So you make the area of the  
14:30:57 25 bottom of the reservoir to fit nicely on top of the base,

1 and then how tall is that base? How tall is that reservoir?  
2 That reservoir height is dictated by the amount of grease  
3 that that unit holds to last a certain interval in a truck's  
4 service life. So that when a trucker goes out on the road  
14:31:16 5 and drives X-thousand miles, he'll use up all the grease in  
6 it, come back and have it filled up at his next service  
7 stop. It's not fancy. It's not ornamental. The size is  
8 dictated by engineering reasons entirely.

9 The follower plate is dictated by engineering reasons  
14:31:34 10 entirely. That's not ornamental. We all know what that  
11 does. It just goes up when the grease gets pumped in and  
12 comes down and assists the grease in, coming out, when it's  
13 being sucked out and pumped through the greasing systems.

14 So now we have the final pumps that are at issue in  
14:31:56 15 this case which are actually the second -- excuse me, the  
16 third and fourth in that line there, the third fourth and  
17 fifth with just the different size, the different size  
18 reservoirs, which again the different size reservoirs are  
19 dictated by how much grease. One of them is -- one of them  
14:32:13 20 is the size correlated with X-thousands of miles of a truck  
21 driving between one service level and another, and the  
22 larger one is correlated with Y-number of miles for a truck  
23 to drive between service levels. So, you know, if someone  
24 really wanted to make one of these things ornamental and  
14:32:33 25 start with all of the engineering principles that go into

1 why that reservoir is the same shape it is, they could have  
2 made it like eight feet tall or three feet tall or some  
3 height totally unnecessary to the amount of grease, that it  
4 holds no one has done that and a reason no one has done that  
14:32:50 5 because there's nothing whatsoever ornamental or arbitrary  
6 or fanciful about the design of any of these pumps. They're  
7 all designed by engineering necessity.

8 Oh, yeah, there was insinuation in the opposing  
9 party's closing that we ambushed them with the earlier  
14:33:15 10 versions of the Groeneveld pump. I guess I ask you folks  
11 did we ambush them with those earlier versions of the pump  
12 or did they hide them from you because they destroyed  
13 Mr. Vermeulen's testimony -- excuse me, destroyed Mr. Van  
14 der Hulst's testimony because in 1980, Mr. Van der Hulst did  
14:33:37 15 not make the pump that is at issue in this case in the early  
16 80's. He made Number 1. Somewhere there was a change along  
17 the way to make Number 2.

18 Number 2 is still in existence in 1988, and -- because  
19 we know that because Mr. Eissis was selling it in 1988. He  
14:33:53 20 was buying it from Groeneveld and selling it in 1988. And  
21 Pump Number 3, according to Mr. Eissis, came out in the  
22 early 90's. That is entirely consistent with  
23 Mr. Vermeulen's testimony. I don't care about, you know,  
24 did Mr. Vermeulen get his years of employment with  
14:34:11 25 Groeneveld off by a little bit. Does that matter a lick in



1 this case? What matters is the testimony that he was part  
2 of the team. No one has said Mr. Vermeulen was the one who  
3 designed anything. He was the part of the team that created  
4 the version of the pump, who engineered the version of the  
14:34:28 5 pump that's at issue today, the one that has the follower  
6 plate, the one that has the engineering gusto that -- that  
7 is there in the Pump Number 3. He testified that everything  
8 about it is functional. He testified that they were under  
9 no orders whatsoever from the company to make anything nice.  
14:34:49 10 They were under orders to make a good pump at the optimal  
11 price, and that's exactly what they did. Let's face it,  
12 folks. These are grease pumps and nothing more than that.  
13 Mr. Van der Hulst wanted them to be automobiles, something  
14 with an outside form to them that covers up all the nice  
14:35:20 15 inside stuff or the -- or the bad inside stuff, something  
16 that, you know -- we all know you peel away the outer shell  
17 of an automobile and what looks -- underneath it is the guts  
18 of the -- the guts of the thing, the thing that makes it  
19 run. But, all of those have covers on them. What you do  
14:35:37 20 with the body is to put your distinctive design on it and  
21 make it look like whatever BMW wants to make it look like or  
22 Ford wants to make it look like or what Buick wants to make  
23 it look like or whoever wants to make it look like. There's  
24 no outside show on this covering up of the guts. The thing  
14:35:55 25 is itself, and it is itself only because of the engineering

1 influences.

2 Let's move on to secondary meaning. Groeneveld has to  
3 prove that in the eyes of the public, the relevant public,  
4 when somebody looks at the Groeneveld pump, they associate  
14:36:25 5 it with Groeneveld based solely on its shape. And I'm  
6 getting the feeling from listening to the Plaintiff's  
7 closing that Steve Osborn is the only person who  
8 testified -- who testified -- Dean Osborn is the only person  
9 who testified in this case, and that their case hinges 100  
14:36:46 10 percent on one person's testimony. Frankly, I'm not sure  
11 his testimony even was as represented. My recollection of  
12 Mr. Osborn's testimony was that he knew and understood  
13 entirely that he was purchasing Lubecore pumps. He knew and  
14 understood entirely he was purchasing them from one  
14:37:06 15 distributor and that he had purchased Groeneveld pumps from  
16 a different distributor. He basically said I kind of like  
17 both these guys, and I'm trying to give each of them a  
18 little business. There was no evidence that he was confused  
19 whatsoever as between the two pumps.

14:37:26 20 Mr. White's testimony on secondary meaning was that  
21 the look of this pump was iconic in the trucking industry.  
22 It reminded him -- can we switch? -- reminded him of the  
23 '57 Chevy Bellaire. It was -- it's that important.  
24 Everybody in the world recognizes it just like they  
14:38:06 25 recognize the '57 Chevy Bellaire. He also said it's as

1 iconic as the '67 Mustang. Now, I got to wonder if there's  
2 any trucking people sitting around the truck stop over a cup  
3 of coffee and saying boy, "Do you all remember when that  
4 Groeneveld pump came out in 1990? I sure would like to have  
14:38:33 5 one of those now. I hope that I can get one at a convention  
6 of historical convention of grease pumps."

7 No one's doing that. The look is not iconic. It's a  
8 grease pump. The people who -- many of the people who  
9 testified that they associate the Groeneveld pump with the  
14:39:03 10 secondary meaning of the Groeneveld pump, meaning the look  
11 of it itself identifies it with Groeneveld, are people who  
12 had been around the pump for a thousand years. I would  
13 expect -- in fact, I would be shocked if the outcome was  
14 otherwise -- that every Groeneveld employee who's been  
14:39:25 15 working the last ten, 15 years, two years, five years, who  
16 cares, that every Groeneveld employee who's been around that  
17 pump for any period of time recognizes it by the shape.  
18 There's no surprise there. So that's Mr. Wapenaar, Ms.  
19 Wilson, Mr. Van der Hulst.

14:39:39 20 Mr. White testified that he recognizes the shape as a  
21 Groeneveld, but he's a fleet truck owner. I can't remember  
22 if it was Conoco or something, and how many thousands of  
23 trucks he has and how many thousands of Groeneveld pumps  
24 he's bought. Boy, I hope he does recognize the pump by the  
14:39:58 25 look of it, but those are aren't the people we're talking

1 about here. We need to find people, and there are none of  
2 them presented to you at all that are consumers or potential  
3 consumers of this pump in the trucking industry who would  
4 have come to you and said yeah, I recognize that pump by the  
14:40:17 5 look.

6 The fact that there was none of those put in front of  
7 you should tell you something. The people who testified  
8 about the look other than Mr. Osborn -- who also had been  
9 buying Groeneveld pumps for a number of years, so he  
14:40:30 10 probably very much should recognize it by the look. There's  
11 nobody who came in here not 100 percent familiar and  
12 saturated with the look of the pump who came in and  
13 testified that I have -- I recognize that pump just by its  
14 silhouette, whether it's dirty or clean, whether it has the  
14:40:47 15 label on it or not.

16 Let's talk about the label. The testimony in this  
17 case from a number of Groeneveld people is that this pump is  
18 their flagship. It appears everywhere. It is Groeneveld.  
19 It is the symbol of Groeneveld. Well, as we looked at some  
14:41:14 20 of the marketing materials, that just isn't true. This is  
21 Plaintiff's Exhibit 6. This is a brochure for a Groeneveld  
22 pump. It's not the EP-0 pump. It's the Compalube, and  
23 that's why the picture is on the brochure. So when you go  
24 back and look at the Plaintiff's Exhibits that have the EP-0  
14:41:39 25 pump at issue in this case on them, please remember

1 Mr. Wapenaar's testimony. All of those pictures, all of  
2 those exhibits are sales literature for that particular  
3 pump. But, when we expand a little bit beyond that  
4 particular pump, the whole story starts to crumble.

14:41:56 5 Remember this one. This is Groeneveld's service truck. On  
6 one side -- and I can't even see. Is that the EP-0 or the  
7 other one?

8 MS. ZUJKOWSKI: That's the other one.

9 MR. ANASTOS: One side of the truck, there's  
14:42:08 10 not the EP-0 pump. There's a different pump. And on the  
11 other side of the truck, there's the EP-0 pump. So which  
12 one's the flagship, which one are they trying to attract  
13 attention to? And by the way, which one has ever been shown  
14 without a label on it? None of them have ever been shown in  
14:42:28 15 any sales literature or even to you, which is kind of odd,  
16 even to you without a label on it. The reason you recognize  
17 those pumps sitting before you today is because of the  
18 label.

19 Remember this one? They were some kind of a trailer  
14:42:43 20 used at trade shows or going to be used at trade shows.  
21 What's the lineup of pumps on the side of it? There's a  
22 bunch of them and nothing at all that attracts any attention  
23 to the EP-0 pump that is supposed to be the flagship and  
24 supposed to be infused with Groeneveld's secondary meaning.

14:43:08 25 Remember this? Another piece of sales literature.

1 When they're trying to tell the EP-0 pump, of course, they  
2 focus on that. When they're trying to sell their products  
3 generally, what do we see? Six pumps. No particular  
4 attention being attracted to the one EP-0. And, of course,  
14:43:26 5 again, they all have the big green Groeneveld label on them.  
6 We showed you the web page. Now, there's an interesting  
7 piece of advertising. There was a policy that the EP-0  
8 serve as the image for Groeneveld. I think Ms. Wilson  
9 testified to that. Then we went to the web page, and what  
14:43:53 10 do we find in the web page? The first page of the web page  
11 didn't have the EP-0 number anywhere. I don't know if you  
12 notice it, something in the corner or the side that  
13 Groeneveld was celebrating 40 years, some kind of a 40-year  
14 anniversary. If it was a 40-year anniversary and they were  
14:44:11 15 trying to tout their image that has supposedly been their  
16 corporate image for the last, I don't know what they're  
17 testifying, 30 years, I guess I would have expected to have  
18 seen that pump on the front page of the web page. It wasn't  
19 there. And when we dug into the truck greasing pumps, there  
14:44:27 20 were a couple of them available there, not just the EP-0,  
21 the twin. I think it was the other one. And again, there  
22 was no particular attention brought whatsoever to the EP-0  
23 pump, and again, it's being sold with its label on it.

24 So if this pump has so much secondary meaning because  
14:44:42 25 of its silhouette, why don't they show it with its

1 silhouette and not the name on it? If the whole world is  
2 supposed to be able to recognize it by the way it looks in  
3 its silhouette, then you think you'd see it someplace in  
4 literature without the label on it.

14:45:06 5 You can put the advertising of that one. One of the  
6 factors that you may consider in the secondary meaning  
7 element here is the amount of advertising dollars that  
8 Groeneveld spends on -- or the amount of dollars Groeneveld  
9 spends on advertising.

14:45:26 10 Now, in 2009, the total expenditures for advertising  
11 in the U.S. was about \$18,000. You see that? Is that odd;  
12 \$18,000 for the whole United States for the whole year?  
13 Divide that by the number of months. How much is it? It's  
14 not very much. And then you look at those advertising  
14:45:59 15 dollars, and besides being insignificant, think of two more  
16 things. First, you have no idea looking at those  
17 advertising dollars what percentage or even if one dollar  
18 was actually used to advertise the EP-0 pump. Second, you  
19 have no idea -- probably have a pretty good idea by now that  
14:46:20 20 none of those advertising dollars were used to advertise the  
21 pump without the label on it. So Groeneveld is making no  
22 effort to convince the public to rely on its label in --  
23 excuse me -- to rely on its silhouette of its pump to  
24 identify that pump as a Groeneveld product. In fact, it's  
14:46:41 25 patently obvious what they're doing is wanting the public to

1       rely on the green label on the pump to identify it as the  
2       Groeneveld pump.

3               You can -- I invite you to assess the evidence of  
4       intentional copying in this case. Please. I mean --  
14:47:09 5       consider everything Ms. Michelson said and everything you've  
6       heard in this case.

7               The words from Mr. Vermeulen were that he was under no  
8       instructions to copy the Groeneveld pump. The words from  
9       Mr. Eissis were the testimony was that he did not instruct  
14:47:28 10       Mr. Vermeulen to copy the Groeneveld pump. What these  
11       guys -- what Mr. Eissis wanted, as testified by him and as  
12       by Mr. Vermeulen, was a pump that was a good working pump  
13       that had design features that were incorporated from many  
14       different pumps. Mr. Eissis testified at length as to --  
14:47:55 15       and so did Mr. Vermeulen, as to what design features were  
16       changed and added to his pump the Lubecore to make it what  
17       he considers a superior product. I won't go through all of  
18       them, but the reservoirs are different material. The base  
19       is a different material. It's more corrosion proof  
14:48:14 20       material. The mounting bracket on the back has bushings in  
21       it and an insulation thing to help make sure it doesn't fall  
22       off of trucks. The follower plate is made of a different  
23       material. The outside of the follower plate is made of a  
24       different material. The guide rod that holds the follower  
14:48:34 25       plate is made of a different material. There were different



performance things that Mr. Eissis identified that it came out to look like it did is no surprise. Why is it no surprise? Because Groeneveld set about to do the same thing when it made its pump, to make a good pump. And the same guy who was involved in making a good pump for Groeneveld years before, a guy who then spent the next 20 years or more of his life working in the automated lubrication system business and who testified that he makes parts and pumps and designs things for all sorts of people, he was involved in the design of this. It should come as no shock that the first thing he would have thought was well they want a good pump, I better start with -- start my thinking where would I begin to make a good pump and that something that looks like the Groeneveld pump was the end result of it. And even if you want to find -- even if you find that there's intentional copying, the presumption of intentional copy is rebutted by evidence that the copying was done for a reason other than to piggy back off the reputation of -- in this case of Groeneveld. There was ample evidence in this case that Mr. Eissis has no desire whatsoever to piggy back off the reputation of Groeneveld. And there was ample evidence that the pump was designed the way it was in order to be a good functioning grease pump, and I guess I'll go back to something I said in the very -- in my opening. Mr. Eissis would have to be an idiot to have intentionally copied their

1 pump and then to have trimmed in red, put the red Lubecore  
2 label on it, stamped his trademark into it in a number of  
3 different places. If he wanted to piggyback back off  
4 Groeneveld's reputation, I think he maybe would have chosen  
14:50:22 5 a different shade of green or something for all of the trim  
6 on there, and especially the follower plate would have been  
7 black because Groeneveld's pump is black. I mean he  
8 distinguished his pump, which means he didn't want to piggy  
9 back off of any reputation of Groeneveld. And, in fact, he  
14:50:40 10 testified that some people probably don't think the  
11 Groeneveld has a great reputation and some people do.  
12 That's fine. He took the risk even going with the way this  
13 looks.

14 Moving on to likelihood of confusion -- hold on --  
14:50:59 15 there's -- there was -- there was absolutely no testimony  
16 whatsoever that anybody, any purchaser at any time of an  
17 automated lubrication system has been confused when making a  
18 purchasing decision about the look of the Lubecore pump and  
19 the Groeneveld pump. All you heard was -- and this should  
14:51:19 20 come as no surprise either. The first time people saw the  
21 pump, they didn't know what it was. Yes, it looks like the  
22 Groeneveld pump. No one's standing up here and saying it  
23 doesn't. But, as soon as they looked at the label, even  
24 Mr. Wapenaar said you can tell what it is from, you know, 50  
14:51:32 25 yards away. You look at the label, and it identifies what

1 it is. In the Groeneveld world, we need to suspend belief  
2 in labels. Labels don't matter I think is what the  
3 testimony was. We can't trust labels. We better not trust  
4 labels. We need to verify what everything is inside the  
14:51:59 5 label. So the next time you go to your pharmacy and pick up  
6 your prescription, and it says that this is drug X on the  
7 outside, don't trust it. It's a label. Go home, find  
8 someone who can make an independent analysis that the item  
9 inside is the chemical compound it claims to be and don't  
14:52:18 10 take it until you've got that analysis because we can't  
11 trust labels. They don't tell us anything about anything.

12 Come on. This is common sense. The label tells you  
13 as much as the label tells you. The label tells you here  
14 that that's a Lubecore. The label on your prescription says  
14:52:34 15 it's whatever -- you know, whatever prescription item you're  
16 taking, the label on the can of green beans tells you what  
17 it is.

18 The Groeneveld world makes believe somehow, get to  
19 some notion that labels don't mean anything. Apply your  
14:52:51 20 common sense to that notion. As far as the likelihood of  
21 confusion is concerned also, wouldn't you have expected if  
22 there was confusion in the marketplace that there would have  
23 been some testimony from somebody even inside Groeneveld who  
24 said we've had customers calling up and saying can I have  
14:53:14 25 that neat red pump of yours? Was there any testimony of any

1 kind like that? Was there any testimony of anybody  
2 approaching Groeneveld and saying boy, that new red pump of  
3 yours, what's that, is that -- is that a cheaper version of  
4 your green pump, is that a better version of your green pump  
14:53:33 5 or you're trying to do some brand differentiation here and  
6 have a green one and a red one, what's the difference?  
7 Nothing like that. Because they understand and know that  
8 the one pump is the Lubecore pump manufactured by a  
9 different company entirely, and that it has no association  
14:53:48 10 whatsoever with Groeneveld. If that evidence was out there,  
11 surely we would have heard it.

12 The fact that that evidence isn't out there sort of  
13 demonstrates that Mr. Eissis has and Lubecore have made a  
14 successful effort in differentiating their brand from  
14:54:12 15 Groeneveld's brand. The expert that you heard testify seem  
16 to think that it hadn't, that Lubecore hadn't achieved that,  
17 but since there's no testimony from anyone of confusion, one  
18 would think that actually means they have successfully  
19 differentiated their brand such as not to cause confusion.  
14:54:31 20 Look at the pump. Look at the red on the pump. Look at the  
21 logo on the pump. The trademark logo. Look at the logo  
22 stamped into the housing. Look at the fact benefit analysis  
23 when you're back in the other room, the fact benefit  
24 analysis the Groeneveld does to explain how its pumps  
14:54:52 25 differ -- how its pump is different and better than other

1 competitors' pumps.

2 Let's see P-64. Look at the sales literature. Go  
3 back and look at the sales literature. The red Lubecore  
4 trim, the red Lubecore teardrop trademark logo, the red  
14:55:18 5 band, the red writing. Switch to the -- go back and look at  
6 the web page of Lubecore. There's a version of it in the  
7 exhibits. I think it might be old, but again, the Lubecore  
8 teardrop logo, the red stripe, no effort whatsoever to piggy  
9 back off of Groeneveld.

14:55:49 10 The second reason there's no confusion whatsoever is  
11 the customers who are buying these items are sophisticated  
12 customers. You've heard testimony about the number of sales  
13 calls it takes to sell someone a system, and that only makes  
14 sense. These are not cheap items. Like I said before,  
14:56:06 15 these are not impulse items that you grab off the counter --  
16 the front of the counter when you're at the CVS buying some  
17 other things. People sit down, first they evaluate whether  
18 or not they even want to go with an automatic lubrication  
19 system, and then they decide if they want to make the  
14:56:22 20 investment, is it worth it, how much does it cost, how good  
21 does it work. Mr. Wapenaar testified that it took a number  
22 of visits to make a sales call, four or five. Mr. Eissis  
23 testified the sales process is complex.

24 The only counter that the other side had to that was  
14:57:05 25 again in Osborn, who is the linchpin of their case

1       apparently. Mr. Osborn, apparently, didn't take five visits  
2       to buy the Lubecore pump. Okay. It didn't take five visits  
3       because he's been -- he's already overcome the issue of  
4       whether or not he wants to purchase these systems.

14:57:07 5           Interchangeability. I'm not sure what this really has  
6       to do with this case, but you heard the testimony from  
7       Mr. Eissis. There is a level of interchangeability and a  
8       level of non-interchangeability in these items. You can  
9       swap out one pump for another person's pump in certain  
14:57:32 10       systems. There are pieces, parts of the Lubecore system  
11       itself -- injectors, blocks, lines -- that would be  
12       compatible with other people's systems, EP-0 systems, and it  
13       may even be some pieces off the Lubecore pump that are  
14       compatible with Groeneveld's pump and perhaps others. Maybe  
14:57:52 15       the reservoir works. Mr. Eissis testified that the  
16       reservoir is not -- the reservoir on the taller version is  
17       not one-to-one interchangeable because they're actually not  
18       exactly the same height. So if someone wants to use it on a  
19       Groeneveld pump, they have to get a change kit. But, so  
14:58:12 20       what? I mean it's an issue that's a non-issue. Just  
21       because some parts are interchangeable and some aren't  
22       doesn't say anything. It's not relevant to any of the  
23       issues in this case.

24           If you get to the point of considering damages in this  
14:58:42 25       case -- and I don't believe you should -- first of all, I

1 think it's interesting that the Plaintiffs have gone with,  
2 in terms of their contribution margin, that number that they  
3 multiply by something else to come up with the lost profits.  
4 They are using the 43 percent from Ms. Wilson, rather than,  
14:59:10 5 I think it was 36 percent from the guy they paid \$30,000 to,  
6 to derive a contribution margin. That's not hard to  
7 understand, now is it? The \$30,000 guy, either he got it  
8 wrong or they really rather use the higher contribution  
9 margin because that would give them higher lost profits if  
14:59:34 10 you get to that point.

11 This document here, which the other side keeps harping  
12 on is what you would have to base your damages calculations  
13 on, as it says is just sales revenues and sales projections.  
14 There are no costs whatsoever taken out of that. Now,  
14:59:56 15 please go to the other one. This is our Defendant's Exhibit  
16 X, and it shows the relevant costs being deducted from the  
17 sales revenue in order to come up with the profit or loss  
18 that -- excuse me -- Lubecore has achieved on selling these  
19 pumps in the United States. Go back and look at this  
15:00:22 20 carefully, and you will see that in the three years that  
21 it's been selling these pumps, it's all at a loss. No  
22 profit yet whatsoever. So -- there's no profits for  
23 Lubecore to disgorge on its sales of EP-0 pumps and systems  
24 in the United States. As a matter of fact, look at how many  
15:00:41 25 pumps it has sold in the United States. What is it? It's

1 less than 500 pumps when you add up the three numbers? Did  
2 you really believe that Groeneveld has been damaged in any  
3 sort of way whatsoever by the sale of 500 pumps by Lubecore  
4 in the United States? How many trucks are there out there  
15:00:56 5 on the road? Many, many, many, many orders of magnitude  
6 more than 500.

7 And also remember what Dr. Burke -- what Dr. Burke  
8 testified to. If there is no evidence that any sale of --  
9 that Lubecore made of Lubecore system was as a result of the  
15:01:27 10 alleged infringe activity, meaning that someone was confused  
11 as between Lubecore and Groeneveld and actually thought they  
12 were buying something that was associated somehow with  
13 Groeneveld, then there are zero damages for this element of  
14 damages, and I submit to you there has been zero testimony  
15:01:44 15 on that.

16 Now, I asked you last Thursday to consider very  
17 carefully who's competing carefully and who's competing  
18 fairly in this case, and who's not competing fairly.

19 Is Groeneveld competing fairly for filing this  
15:02:18 20 lawsuit? Is Groeneveld competing fairly for registering the  
21 Lubecore name in three countries in Europe so that Lubecore  
22 and its distributors cannot use that name overseas? Is that  
23 fair competition? Is that a nice thing to do? They've  
24 gotten up here in front of you and made it sound like  
15:02:37 25 they're the good guys. Does that signify the good guys?



1           In my opening I said that I would -- the other side  
2           would not be able to prove to you that Mr. Eissis has horns.  
3           There's nothing sinister about what Mr. Eissis is doing. He  
4           started a business, and he wants to compete in the  
15:03:02 5           marketplace. He's competing fairly, and if his pump is bad,  
6           if people don't want to buy his pump, the market will sort  
7           that out. There's no need to preclude him in any shape,  
8           way, shape, or form from selling his systems.

9           On behalf of myself and my trial team, Ms. Zujkowski,  
15:03:28 10           I would like to say it has been an honor and a privilege to  
11           try this case to you. Someday you can tell your children  
12           and grandchildren that you got to take part in the grease  
13           pump trial of the century.

14                           (Laughter.)

15:03:40 15                   MR. ANASTOS: As I said in my opening, I hope  
16           you take something away from this positive. I hope you've  
17           learned something; if nothing else, about automated  
18           lubrication systems. I hope you enjoyed yourself, and I  
19           thank you very much for your attention.

15:03:52 20                   THE COURT: Thank you. You may conclude.

21                   MS. MICHELSON: Thanks, your Honor.  
22  
23  
24  
25

CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF

MS. MICHELSON: The current design, overall appearance, and shape and the way Groeneveld pump looks and has looked for years, years and years, indisputably years -- Mr. Van der Hulst's testimony is it actually costs more to make it look this way. It would cost him less to make it a different way. The -- there is no cost benefit of making it look exactly the same way that it looks now, either Groeneveld itself or the Lubecore imitation. In fact, the only evidence here is that making it look exactly this way costs more. It is not functional.

Mr. Eissis' testimony is that it doesn't have to be this shape. It does not have to look this way to perform the function, the use, the purpose for which it is intended. It is also not functional for those reasons.

Mr. Vermeulen's testimony just doesn't hold up. He can't -- you know, he's -- he's off a little on dates. I mean come on. This is the guy who said that he remembered measurements and tolerances of the 50-plus Groeneveld pump component parts from when he worked there in the 1990s. But, he doesn't remember a date? And what is his testimony about the dates? He says there was a 30-year generation gap between the Groeneveld pump design of the pump that's at issue in this case and the Lubecore -- the Lubecore being the next generation. I guess that makes it the fourth

1 generation of the Groeneveld; 30-year generation gap. 2011,  
2 minus 30 is 1981. 2008 minus 30 is 1978.

3 Even if you believe that Vermeulen was at Groeneveld,  
4 as he says, in '84, again his dates, they just don't add up.  
15:07:01 5 And these are dates -- these are numbers of an engineer who  
6 claims to have designed not one, but two systems with a  
7 30-year generation gap between them.

8 Mr. Vermeulen did not say a word to you about those  
9 two -- those two pumps. The first type two. I have to look  
15:07:30 10 at the Exhibit Number for the record because I can't  
11 remember them. DX-AA and DX-Y. Mr. Vermeulen did not  
12 testify that these were the pumps that were in existence  
13 until he came to Groeneveld and saved the day and then, I  
14 guess, went off to Korea. He did not tell you that.

15:07:59 15 And Mr. Willem van der Hulst -- the names are a bit of  
16 a tongue twister for me -- he testified which one his team  
17 designed in the 1980s and has been on the market for the 30  
18 years that Mr. Vermeulen confirmed as its entry into the  
19 market.

15:08:27 20 By the way, the implication that I somehow or that  
21 Groeneveld somehow hid these two early pumps from you is --  
22 let me just say I -- I will let you reach your own  
23 conclusions on that.

24 Defense complains about the people we call to testify,  
15:08:58 25 including by the way, their own Defense witnesses, I

1 suppose, the witnesses that somehow they were -- they're  
2 saturated in the industry about which this case is involved  
3 in, but we didn't just bring in Groeneveld people. There  
4 was an end user customer out in Wisconsin, Mr. Osborn,  
15:09:25 5 Orville White, national fleet customer out on the east  
6 coast, they were distributors. Mr. DeCleene, Mr. Koppelman  
7 who testified. You had testimony from Scott Marcum, a  
8 Defense witness on these issues. And yes, you did have  
9 people who are involved in Groeneveld. There was an array  
15:09:48 10 of different people who participated and are involved in the  
11 ALS world, which is what this case is about. That's the  
12 relevant population. That is the relevant population.

13 You want 8,000 people to come in and say the same  
14 thing. I don't know. I thought this trial was long enough.  
15:10:09 15 You had a cross section of people who told you that they  
16 recognized that Groeneveld pump on sight because of the way  
17 it looks and those people include Mr. Koppelman and  
18 Mr. Marcum, both of whom are actually Defense witnesses.

19 The label -- the label thing about the pharmacy, you  
15:10:40 20 know, these are not -- these are -- the testimony in this  
21 case is that the label is not the dispositive issue. It's  
22 not the dispositive identifier. It's not the predominant  
23 brand identifier. Every single person said it's the shape.  
24 Mr. Koppelman -- again, their own -- their own guy said the  
15:11:08 25 label's the last thing he would look at. And Mr. Vermeulen,

1 he actually said in his testimony you can't tell anything  
2 about a product or its source or its origin by looking at  
3 the label. Defense witness said that.

4 There was some insinuation on our damages that about  
15:11:43 5 the -- that because Gail Wilson came up with a 40 percent  
6 contribution margin -- and I read you the exact one because  
7 I don't want to be accused of misrepresenting any of that to  
8 you -- hers was 41.3 percent over a three-year period of  
9 time, and Mr. Burkes' was 36.53 percent over a six-year  
15:12:10 10 period of time that Mr. Burke told you himself does not have  
11 statistical relevance. It's not -- it's within the range.  
12 So you know what? The Defense doesn't want you to go with  
13 Ms. Wilson's numbers of the \$1,225,627. They want --  
14 they're complaining about that. Fine. You want to go with  
15:12:40 15 Dr. Burke's numbers, we'll take the -- we'll take his  
16 calculation of \$2,856,326, which by the way, doesn't even  
17 include the 2009 sales because Dr. Burke didn't have that  
18 information because we didn't have that information because  
19 it wasn't included in the original materials the Defendant  
15:13:07 20 gave us.

21 Five hundred pumps, 500 pumps, taking sales of 500  
22 pumps is no damage. It's meaningless, it's nothing. Well  
23 guess what? Five hundred pumps times the conservative \$1500  
24 per system, per system that Ms. Wilson told you they -- is  
15:13:48 25 for their distribution charge, the normal price they get

1 from when they sell it to distributors, that's \$750,000. I  
2 don't know. I think that's damage. I think that means  
3 something. Even if you believe it's only 500 pumps, which  
4 you have to deem credible, 100 percent credible, the new  
15:14:16 5 exhibit that they brought in two days before trial,  
6 Defendant's Exhibit X, that's meaningful. That's harm.

7 It's no profit whatsoever. Guess what? Those numbers  
8 are not verified in the new exhibit, Defendant's Exhibit  
9 numbers. They're not independently assessed. They're not  
15:14:41 10 authenticated. The person who did them aren't here. There  
11 was nobody even checked to make sure they're accurate.  
12 There were dates wrong in there. I -- and there are  
13 deductions included in there that are not even permissible  
14 under the law as the Judge gave it to you. And you can't  
15:15:01 15 even tell that on the face of the document itself. That  
16 being said, the Defendant has not demonstrated what it needs  
17 to demonstrate in order to get the benefit of those claimed  
18 deductions and expenses and costs.

19 You know, I've got to tell you something. No one  
15:15:42 20 thinks Mr. Eissis is an idiot. Nobody, nobody thinks he is.  
21 He's smart. He put a band of red in his pump. That's not a  
22 red pump. That's a thin band of red and a sticker on  
23 something that looks exactly like somebody else's product.  
24 He's smart, but guess what? It doesn't make -- it doesn't  
15:16:15 25 make -- it doesn't sufficiently distinguish the overall look

1 of his thing from the overall look of Groeneveld's thing,  
2 and that's what a label needs to do to overcome the  
3 predominant impression that you get when you see those  
4 things because the label is not the predominant brand  
15:16:38 5 identifier, and that band of red isn't either. It's the  
6 shape. And every single witness told you that, including  
7 Defense witnesses.

8 Ladies and gentlemen, Mr. Eissis knows very well  
9 because he puts it in his marketing materials that it takes  
15:16:58 10 20 years to build a reputation and five minutes to ruin it.  
11 Time is up. Nobody enters the marketplace with a supposedly  
12 improved product and makes it look that much like the  
13 existing predominant product, exactly like the last  
14 generation if they are truly trying to establish an  
15:17:34 15 independent corporate identity and image, and they don't do  
16 it in this industry for sure, and you know that because you  
17 met a lot of people in this industry, and you know how they  
18 identify pumps when they look at them and encounter them in  
19 their industry and in their marketplace.

15:17:57 20 I never came here to prove to you that Mr. Eissis has  
21 horns. I make no -- we make no character judgments here.  
22 It's not about a bad person, a good person. That is not  
23 what the case is about. When I heard it in opening  
24 statement, it -- it -- it was such a discord in me because  
15:18:25 25 it's not about horns or devils or bad morality; it's about

1 if the product confuses the marketplace.

2 I ask you -- we ask you, Groeneveld asks you to use  
3 your common sense. I know you will. Look at the products.  
4 Think about the real world, the real marketplace world in  
15:18:54 5 the ALS industry, not when you go to a store and pick an  
6 item, a can of beans off a shelf. Okay. I'm talking about  
7 the marketplace that is at issue here, and the totality of  
8 the evidence, the credibility of the witnesses, and your own  
9 life experiences and common sense, and ask you to return a  
15:19:15 10 verdict in favor of Groeneveld. Thank you.

11 THE COURT: Thank you. Almost finished.

12 Now, ladies and gentlemen, the verdict in this case,  
13 and the answers to the interrogatories that I submit to you  
14 have to be -- the considered judgment of each member of the  
15:20:01 15 jury. So in order to return a verdict or an answer to any  
16 interrogatory, all 12 of you must agree. In other words,  
17 the answer to the interrogatory or interrogatories and the  
18 verdict must be unanimous. So it's your duty as jurors to  
19 consult with each other, to deliberate with a view to  
15:20:19 20 reaching an agreement if you can do so without doing  
21 violence to your individual conscience and good judgment.

22 But, you must each decide the case for yourself and do  
23 that only after an impartial consideration of all the  
24 evidence in the case with your fellow jurors.

15:20:33 25 In the course of your deliberations, of course, do not



1 hesitate to reexamine your own views and change your opinion  
2 if you're convinced it's erroneous. However, do not  
3 surrender any honest conviction as to the weight or affect  
4 of any evidence solely because of the opinion of another  
15:20:49 5 juror or your fellow jurors or for the sake of reaching an  
6 agreement or a verdict.

7 Remember, at all times you're not partisans. You are  
8 judges, judges of the facts as presented during the course  
9 of this trial.

15:21:02 10 For your convenience, in order to assist you in  
11 reaching a proper decision, I'm submitting to you a set of  
12 written questions. They're called interrogatories. What  
13 I'll do is display and read them to you, and I think once  
14 you look at them and hear me give the description, they'll  
15:21:17 15 be self-explanatory.

16 Interrogatory Number 1, you see the caption's on top  
17 of each page. I say do you find that Plaintiff Groeneveld  
18 proved by a preponderance of the evidence that its trade  
19 dress, the external shape and appearance of the pump,  
15:21:35 20 including logo and color, are nonfunctional? And there is a  
21 blank space right there. I said in bold print insert in ink  
22 either yes or no according to your findings. There are 12  
23 signature bars located below that. So each of you sign in  
24 the appropriate signature bar, and the juror that you  
15:21:53 25 selected as foreperson signs on the first. The other 11

1 concurring jurors sign in whatever order you want. And then  
2 the date that you do that, you insert here's the date. You  
3 put the date here.

4 Down below I say if your answer to Interrogatory  
15:22:07 5 Number 1 is yes, then you proceed to Interrogatory Number 2.  
6 If your answer is no, do not answer Interrogatory Number 2  
7 and enter a verdict in favor of the Defendant. Okay. I  
8 think that's self-explanatory on that, but if your answer is  
9 yes, then you go to Interrogatory Number 2, which says, "Do  
15:22:26 10 you find that Plaintiff Groeneveld proved by a preponderance  
11 of the evidence that its trade dress, the external shape and  
12 appearance of the pump, including logo and color, is  
13 distinctive in the marketplace, then it has acquired  
14 secondary meaning," but again, your answer there, either yes  
15:22:43 15 or no, according to your findings with the 12 signature  
16 bars, and then the same dated line down below.

17 It says below that, if your answer to Interrogatory  
18 Number 2 is yes, that means you've answered yes to both 1  
19 and 2, proceed to Interrogatory Number 3. If your answer is  
15:22:59 20 no, do not answer Interrogatory Number 3 and enter a verdict  
21 in favor of the Defendant. Again, I think that's  
22 self-explanatory.

23 Interrogatory Number 3 says, "Do you find that  
24 Plaintiff Groeneveld proved by a preponderance of the  
15:23:12 25 evidence that there was a likelihood of confusion in the

1 minds of consumers of EP-0 pumps as to the source of  
2 Defendant Lubecore's EP-0 pump?" I think we spelled  
3 Lubecore wrong, but maybe not. If I did, forgive me. And  
4 then there's a blank space there. Either say yes or no;  
15:23:31 5 again, according to your findings, the signature bars and  
6 the date line.

7 At the bottom of that, it says, "If your answer to  
8 Interrogatory Number 3 is yes, enter a verdict in favor of  
9 the Plaintiff. If your answer is no, enter a verdict in  
15:23:45 10 favor of the Defendant."

11 And then the verdict form. It says, "We, the jury,  
12 being duly impaneled and sworn, find by a preponderance of  
13 the evidence in favor of the Plaintiff Groeneveld on  
14 Plaintiff's claim of trade dress infringement under the  
15:24:00 15 Lanham Act, 15, United States Code, Section 1125(a), and  
16 against Defendant Lubecore, and award damages, if any, in  
17 the amount of," there's a blank space. I say next to it,  
18 "Insert an amount from zero dollars to whatever you think  
19 the evidence and the law requires." Twelve signature bars,  
15:24:17 20 and a date form on the bottom. And then there's another  
21 verdict form. If you find in favor of the Defendant, it  
22 says, "We, the jury, being duly impaneled and sworn, find by  
23 a preponderance of the evidence in the favor of," shouldn't  
24 be that. Find -- got to change that. Where are you, Betsy?  
15:24:32 25 Yeah, you don't find by a preponderance of the evidence in

1 favor of the Defendant. It just -- you find in favor of the  
2 Defendant on the Plaintiff's claim. We'll change that  
3 because the Defendant has no burden of proof as we told you.  
4 Okay. I'll fix that, and then we'll get that to you at the  
15:24:47 5 appropriate time.

6 Now, it's proper to add this caution -- and I am when  
7 I give these instructions -- that is, nothing I said in the  
8 instructions nor in any manner of presenting the  
9 interrogatories to you or the verdict form is to indicate in  
15:25:02 10 any way how I feel you should decide the case or what the  
11 verdict should be. That's a decision that you make.

12 Now, immediately upon your retirement, you should  
13 proceed to select one of your members as the foreperson.  
14 Now, the foreperson has no greater authority nor any greater  
15:25:18 15 responsibility than any other Members of the Jury, except  
16 the Court charges the Foreperson with the responsibility:  
17 One, of confining the discussions in the jury room to the  
18 evidence and the law in this case; two, to making sure that  
19 the interrogatory or interrogatories and verdict form are  
15:25:34 20 signed and dated in ink according to the instructions that  
21 I've given you; and three, that if there is to be any  
22 communication with the Court, your foreperson has to sign  
23 the note that's communicated to the Court and date it.  
24 Otherwise, the foreperson has no greater authority nor any  
15:25:51 25 greater responsibility than any other member of the jury.

1 Just as a kind of a caveat here, don't spend two days  
2 arguing about who the foreperson is going to be because you  
3 watched TV and you see that the Judge makes the foreperson  
4 disclose the verdict because when you come back here in open  
15:26:06 5 court, I will read the interrogatory answer or answers and  
6 the verdict. So you don't have to worry about that.

7 Now, regardless of any opinion that you may have as to  
8 what the law is or what the law ought to be, given the facts  
9 in this case, remember as I've told you repeatedly, it would  
15:26:22 10 be a violation of your sworn duty to base any interrogatory  
11 answer or any verdict on any law other than the law that I  
12 have given in the instructions in this case or the facts as  
13 they have been presented during the course of the trial.

14 Now, I do hope that these instructions have been  
15:26:38 15 sufficiently clear to enable each one of you to perform your  
16 duties. Now, if you decide that you need to address a  
17 communication to the Court, you must first reduce that  
18 communication to writing, have it signed and dated. Signed  
19 and dated. Okay? And then you can contact the Court by  
15:27:01 20 using the push button located in the jury room, and then  
21 I'll get the question and endeavor to answer it. All right?

22 And then after you have reached a decision in the  
23 case, the final decision, you contact the Court, as I said,  
24 by using the push button located in the jury room. We'll  
15:27:17 25 bring you back here in open court and I will read the answer

1 or answers and the verdict form.

2 Now, let me say this that when you commence your  
3 deliberations, again as I've said, this is America. Each  
4 side or each person in an American jury has the right to  
15:27:35 5 give his or her opinion about what you think the state of  
6 the evidence has been during the course of the trial, and  
7 each juror should give the courtesy to your fellow jurors  
8 and listen to what they have to say; and then at the  
9 conclusion of which, you can come up with a fair and  
15:27:49 10 responsible decision.

11 Now, are there any objections, modifications, or  
12 deletions to the instructions by the Plaintiff or the  
13 Defense?

14 MS. MICHELSON: We have some.

15:27:58 15 THE COURT: Okay. Come up to the side. All  
16 right. You can stand and stretch. This will take about a  
17 minute or two.

18 (Discussion at side bar off the record.)

19 THE COURT: Okay. We're all set.

15:33:43 20 Now, we're going to -- you are going to deliberate in  
21 our jury room, which is on 15. So somebody will take you  
22 down there. Either Jeanie or Megan or Betsy or a  
23 combination of all three, will take you down there and take  
24 you the back way. And so you do the right thing, and then  
15:34:07 25 we'll get the exhibits down to you. So I repeatedly

1 suggested to the lawyers they get everything ready in order  
2 to go down so you can commence.

3 And let me say this; that as we begin, as you begin --  
4 I did it again. As you begin your deliberations, you take  
15:34:25 5 whatever time you think is necessary in order to reach a  
6 fair decision. I've been in trials that lasted for months,  
7 and the jury came back in five minutes. I had one case that  
8 lasted two months. Not too long ago, I didn't even leave  
9 the bench, I was talking to the Court Reporter, we got a  
15:34:42 10 buzz there was a verdict. So other times you have a case  
11 that lasted a day and the jury deliberates for five or six  
12 days. The point of -- the moral of this story is you take  
13 whatever time you think the evidence and the law requires.  
14 There's no set amount of time. Long time, short time.  
15:35:01 15 That's one thing.

16 The second thing is the nature of your deliberations.  
17 Everybody has agreed that if you want to go on a break or  
18 smoke break or go home tonight, and you haven't reached a  
19 decision, that you can do so without me giving this  
15:35:14 20 additional instruction, and that is this: That you may  
21 discuss the case only when all 12 of you are together in the  
22 confines of your jury room. So one or more people leave for  
23 one reason to use the restroom, something like that, kind of  
24 suspend your discussions and certainly don't disclose to  
15:35:31 25 anybody the nature of your deliberations or the extent of it

1 until it's over. And then when you do that -- when you have  
2 reached a decision, you come back here in court. As I said,  
3 I will read the verdict. I say this in every case as well  
4 because we don't know what goes on with, you know, people  
15:35:46 5 watching TV and what's in your mind, but we have a court  
6 rule that says nobody -- that means nobody has any right to  
7 have any contact with any member of any jury without the  
8 Judge first giving permission, and I don't give that  
9 permission.

15:36:07 10 So you commence and conduct your deliberations secure  
11 in the knowledge that no one will have any contact with any  
12 Members of the Jury, nor will anybody look behind your  
13 verdict for any reason. When your verdict comes out in open  
14 court, that's it and your responsibility has concluded. So  
15:36:22 15 you -- I say this, and I say it emphatically as I can  
16 because, you know, you watch TV shows and you see jurors  
17 being interviewed on the front steps of the newspaper or  
18 lawyers chasing them down the street or something like that.  
19 That's California.

15:36:35 20 We're in Ohio, and this is federal court, and so, and  
21 we have our ways to enforce those rules, believe me when I  
22 tell you. So it's not breached. It hasn't been breached in  
23 my experience. So don't worry about that. All right.  
24 Really goes more for a case that involves unbelievable  
15:36:50 25 violence or something like that. People -- jurors have a



1 tendency -- my only story I'll tell you before you leave,  
2 and that is you know I spent nine years as a Prosecutor  
3 trying all kinds of murders and this, that, and the other  
4 thing. Never throughout for a second the jurors would be  
15:37:04 5 concerned about their safety. Never even dawned on me. My  
6 first case as a Judge I walked in after the jury reached a  
7 verdict, they all wanted to know who are all the people  
8 coming in and out of the courtroom. They were all afraid.  
9 You know, I was unsympathetic and didn't think about that,  
15:37:21 10 that jurors are concerned with who the people are watching.  
11 And then I made it a point to say like this in every case,  
12 those are people on other cases. Some have an interest in  
13 the case, most don't. Most people you see coming in or out  
14 have other cases with me, just trying to figure out when I'm  
15:37:36 15 going on break so they can talk to me. So don't be  
16 concerned about that. That's really what that's all about.

17 So if you -- and then Jeanie doesn't like this  
18 comment. We've had jurors here as late as 2:00 in the  
19 morning. I'm not suggesting you stay here that way, but you  
15:37:52 20 take the time you think the evidence and the law require.  
21 So if you want to go home at our regular time, then you --  
22 and you haven't reached a decision, let us know and you can  
23 go home, and you'll resume and tell us what time you want to  
24 start in the morning. If you want to go past then because  
15:38:08 25 you think you may be able to reach a decision today without

1 coming back tomorrow, you do that, too. But, what I'm  
2 telling you is no one is going to influence the course of  
3 your deliberations. That's your decision to make. Okay?  
4 So good luck. Oh, I should say this: You'll have a copy of  
15:38:24 5 these instructions, the corrected verdict form, and the  
6 spelling on Lubecore in the one verdict form, and you'll  
7 have all the exhibits brought down to you very quickly, but  
8 Jeanie, I think, will take you -- don't go out that door.  
9 You walk in the closet. You can -- you can go out that way  
15:38:41 10 and Jeanie will take you down.

11 (Proceedings in the absence of the jury:)

12 THE COURT: There were several objections made  
13 to the jury instructions, and basically, basically it  
14 involved the description of the trade dress claim, and the  
15:40:19 15 Plaintiff doesn't want the logo and the colors included.  
16 That's why I kept asking what the trade dress claim actually  
17 was. And then it was the appearance of the pump. And so I  
18 think that's proper. The objection is overruled.

19 Then we had, let's see, on Page 23, generic  
15:40:43 20 configurations. The Plaintiff wanted generic designs. I  
21 think configurations is enough synonymous of a word. And  
22 then on Page 27, let's see. Here, I'm not sure what your  
23 objection to 27 was.

24 MS. MICHELSON: On Page 22, our objection was  
15:41:10 25 that the instruction regarding engineering necessity is

1 configuration.

2 THE COURT: That's right.

3 MS. MICHELSON: That that is only in cases  
4 where there is a single core functional component, and that  
15:41:22 5 our objection is that this -- that is not the evidence in  
6 this case. Also on Page 22, your Honor, in the last  
7 paragraph where it says distinctive about Groeneveld's pump,  
8 other than the Groeneveld logo and green coloring, and that  
9 every component of the pump performs a function and goes on,  
15:41:43 10 and we think the correct -- we're objecting to the word, and  
11 because we think that the correct word should be "or."

12 And we -- our further objection is as follows. We  
13 think it should read as follows, totality of it. If you  
14 agree with the Defendant that there's nothing arbitrary,  
15:42:01 15 fanciful, or distinctive about Groeneveld's pump other than  
16 the Groeneveld logo and green coloring, or that every  
17 component of the pump performs a function and is part of the  
18 pump for a reason and that their arrangement is functional,  
19 you must find for the Defendant and it's not necessary to  
15:42:19 20 continue.

21 THE COURT: I can change the word "and" to  
22 "or." I don't know if that's a big --

23 MS. MICHELSON: Because I don't think we have  
24 to prove both. And so I -- that was the basis of that  
15:42:32 25 objection.

1 THE COURT: But, your -- I shouldn't say that  
2 because your claim is the appearance of looking at it.

3 MS. MICHELSON: We don't have to prove both.  
4 We prove one or the other.

15:42:43 5 THE COURT: You can prove -- you can prove the  
6 logo is? All right. I'm not going to get into a debate  
7 with you. Go ahead. What's on Page 23? I said the  
8 configurations. So the objection is overruled on 22. 23,  
9 configuration is the correct statement. 27, I'm not sure  
10 what the --

11 MS. MICHELSON: Yes, I'll just articulate it  
12 quickly. The instruction reads, jumping down one, two --  
13 one, two, three, four, to the fifth line, "In the minds of  
14 consumers." Our position is that the better statement of  
15 the law is a likelihood of confusion or uncertainty in the  
16 relevant market as to the source or origin of the two  
17 parties' products. On Page 20 -- I don't know if you want  
18 to rule or if I should just continue.

19 THE COURT: Go ahead. You had consumer in a  
15:43:36 20 couple places. I think consumer is the right word.

21 MS. MICHELSON: Yeah, and it appears you are  
22 correct, your Honor. On Page 28 where it says, "If you find  
23 that there's not a likelihood that a reasonable consumer."  
24 Our objection is that it's not just a reasonable consumer.  
15:43:53 25 It's a reasonable person involved in the ALS industry would

1 be confused or uncertain as to the source or origin or  
2 quality of the Defendant's EP-0 pump.

3 THE COURT: Okay. I don't think that's the  
4 correct statement of the law. I think the consumer is the  
15:44:08 5 correct statement. Okay.

6 Would you get the exhibits, if they're altogether,  
7 when they come up with the --

8 MR. ANASTOS: How do we get the pumps down  
9 there?

15:44:22 10 THE COURT: They're coming up with a carrier.

11 MS. MICHELSON: Your Honor, one other thing.  
12 An exhibit, we marked an additional exhibit, additional pump  
13 during Mr. Eissis' cross-examination, and we would like that  
14 to be moved into evidence as well. I believe -- Melissa, I  
15:44:36 15 don't think there's an objection.

16 THE COURT: No, there isn't.

17 MS. ZUJKOWSKI: There's no objection to the  
18 pump.

19 THE COURT: Just mark it.

15:44:42 20 MR. KUNSELMAN: 143, your Honor. Plaintiff's  
21 Exhibit 143.

22 THE COURT: Okay.

23 MS. MICHELSON: And then, your Honor, we're  
24 going to mark as 144 the -- there's an exhibit on the  
15:44:55 25 witness box.

1 MS. ZUJKOWSKI: Thank you, your Honor. This  
2 is a marked version.

3 MR. ANASTOS: They're all marked.

4 MS. MICHELSON: We're going to mark and offer  
15:45:03 5 as an exhibit as part of a proffer for Dr. Rashidi. We'll  
6 mark his curriculum vitae and his report as Exhibit 144 as  
7 part of the proffer.

8 THE COURT: All right. You can do that, yeah.

9 MS. MICHELSON: Then I -- it's 141 there  
15:45:29 10 indeed then, not 144.

11 THE COURT: That's all right.

12 MR. ANASTOS: Your Honor, we do renew the Rule  
13 50 motion.

14 THE COURT: All right. I'm still keeping it  
15:45:39 15 under advisement.

16 MR. ANASTOS: Thank you.

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1                   THURSDAY SESSION, OCTOBER 20, 2011, AT 6:34 P.M.

2                   THE COURT: Mr. Moizuk, has the jury reached a  
3 decision, sir?

4                   THE FOREPERSON: Yes, your Honor.

18:43:04 5                   THE COURT: Would you hand everything to  
6 Jeanie.

7                   For those of you old enough to remember Johnny Carson,  
8 when I do this, I say that. Not too many people remember it  
9 anymore. Okay.

18:44:18 10                  Interrogatory Number 1, "Do you find the Plaintiff  
11 Groeneveld proved by a preponderance of the evidence that  
12 its trade dress, the external shape and appearance of the  
13 pump, including logo and color, are nonfunctional?" The  
14 answer is yes. Signed in ink by all 12 jurors, dated  
18:44:34 15 today's date.

16                  Interrogatory Number 2, "Do you find that Plaintiff  
17 Groeneveld proved by a preponderance of the evidence that  
18 its trade dress, the external shape and appearance of the  
19 pump, including logo and color, is distinctive in the  
18:44:46 20 marketplace, that it has acquired secondary meaning?" The  
21 answer is yes, and signed in ink by all 12 jurors and dated  
22 today's date.

23                  Interrogatory Number 3, "Do you find that Plaintiff  
24 Groeneveld proved by a preponderance of the evidence that  
18:45:00 25 there's a likelihood of confusion in the minds of consumers

1 of EP-0 pumps as to the source of Defendant Lubecore's EP-0  
2 pump?" The answer is yes, signed in ink by all 12 jurors,  
3 dated today's date.

4 Verdict, "We, the jury, being duly impaneled and  
18:45:16 5 sworn, find by a preponderance of the evidence in favor of  
6 the Plaintiff, Groeneveld, on Plaintiff's claim of trade  
7 dress infringement under the Lanham Act, and against  
8 Defendant Lubecore, and award damages, if any, in the amount  
9 of \$1,225,000. Signed in ink by all 12 jurors and dated  
18:45:33 10 today's date.

11 Now, the single question I'm going to ask each one of  
12 you is have I correctly read the interrogatory answers and  
13 your verdict? Juror Number 1?

14 JUROR NUMBER 1: Yes, you have, your Honor.

18:45:43 15 THE COURT: Number 2?

16 JUROR NUMBER 2: Yes, you have, your Honor.

17 THE COURT: Number 3?

18 JUROR NUMBER 3: Yes, you have, your Honor.

19 THE COURT: 4?

18:45:46 20 JUROR NUMBER 4: Yes, you have.

21 THE COURT: 5?

22 JUROR NUMBER 5: Yes.

23 THE COURT: 6?

24 JUROR NUMBER 6: Yes, your Honor.

18:45:49 25 THE COURT: 7?



1 JUROR NUMBER 7: Yes, your Honor.

2 THE COURT: 8?

3 JUROR NUMBER 8: Yes, your Honor.

4 THE COURT: 9?

18:45:52 5 JUROR NUMBER 9: Yes, your Honor.

6 THE COURT: 10?

7 JUROR NUMBER 10: Yes, your Honor.

8 THE COURT: 11?

9 JUROR NUMBER 11: Yes, your Honor.

18:45:55 10 THE COURT: And 12?

11 JUROR NUMBER 12: Yes.

12 THE COURT: Thank you.

13 The verdict forms and -- the verdict form is correct  
14 and the interrogatories are correct in form, and so I'm  
18:46:02 15 going to accept each of the interrogatory answers and the  
16 verdict. That will conclude any further service that you  
17 have as jurors.

18 Is there anything further on behalf of the Plaintiff?

19 MS. MICHELSON: Your Honor, we do need to take  
18:46:13 20 a matter up at side bar before you discharge the jury, in  
21 light of the verdict.

22 THE COURT: Okay. Hang on. I know what  
23 you're going to --

24 MS. MICHELSON: Yeah.

18:46:22 25 THE COURT: We'll deal with that at another

1 time. Maybe tomorrow morning.

2 MS. MICHELSON: It is --

3 THE COURT: There's another claim here of a  
4 different type of damage that has to be litigated. And so  
18:46:34 5 what that would mean is -- you probably didn't know this. I  
6 couldn't tell you before -- you'll have to come back before  
7 then. I know. I'll give you a choice. Come back tomorrow  
8 or come back Tuesday morning. Shaun, you speak for the  
9 crowd.

18:46:49 10 THE FOREPERSON: Tomorrow.

11 THE COURT: Same time, same station. Is that  
12 fair?

13 THE JURY: Fair.

14 THE COURT: Thanks very much. See you at  
18:47:29 15 8:15.

16 (Proceedings adjourned at 6:47 p.m.)

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1	CROSS-EXAMINATION OF JAN EISSIS	846
2	DIRECT EXAMINATION OF SUSAN COKER	897
3	CROSS-EXAMINATION OF SUSAN COKER	899
4	CHARGE OF THE COURT	934
5	CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF	962
6	CLOSING ARGUMENTS ON BEHALF OF THE DEFENSE	992
7	CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF	1015

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## C E R T I F I C A T E

10 I certify that the foregoing is a correct  
11 transcript from the record of proceedings in the  
12 above-entitled matter.

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16

s/Shirle Perkins  
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